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INDIAN WATER POLICY

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

SPECIAL HEARING ON INDIAN WATER POLICY

APRIL 6, 1989
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INDIAN WATER POLICY

THURSDAY, APRIL 6, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room 216, Hart Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Bradley, DeConcini, McCain, Daschle, and Conrad.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The special hearing will please come to order.

Welcome to this hearing of the Select Committee on Indian Affairs on Indian water policy. On behalf of the members of the select committee, I want to welcome a colleague and a friend, a member who, although from a State that does not have any Indian reservations, has proved to be a champion of Indian rights at some crucial times in the past years. He is the most respected chairman of the Subcommittee on Water and Power of the Committee on Energy and Natural Resources, the Senator from New Jersey, Mr. Bradley. He will be with us later.

Water means many things to many people. Tribal elders have impressed upon this committee the sacred values that water holds in most Indian cultures. Tribal elders instruct us that water is a gift from the Creator, that it is impressed with a sacred trust. As expressed by Governor Tenorio of the San Felipe Pueblo in 1978: "Water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die."

There is no question that, in addition to its sacred value, water is a critical resource that determines the very survival of all life on this planet. The need to protect this precious resource is obvious, whether it is to maintain in-stream flows for the survival of wildlife, to irrigate lands so that crops may be grown upon them, to use for energy development, municipal and industrial purposes, as well as to provide a source of water for human consumption. Its uses are diverse, but vitally necessary.

Naturally, as with any commodity that is highly valued and, in some areas, scarce, there are competing priorities for the use of water, just as there are competing claims, based on rights that are defined in law. We are here this afternoon to examine the Indian water right—to develop an understanding of its fundamental characteristics, the limits of its use, if any, and the various processes that are applied in resolving competing claims or priorities for use.

Early in this century, the Supreme Court recognized and affirmed the need for water to sustain life on Indian reservations and to assure a permanent homeland for tribal people. Since that time, the court has refined the manner in which Indian water rights are defined and how they relate to the water rights of other water users.

Today we will examine the fundamental tenets of Indian water law, the manner in which Indian water rights are exercised within a State system of regulation, and the larger economic and political trends affecting the various uses of water, as well as the plans tribes may have for developing their water resources.

Second, we will explore, from the perspective of tribal leaders, their views on Indian water rights and the manner in which the tribes they represent are currently managing their resources.

We will hear from tribal government officials whose reservations are situated in different parts of the country, and, as a function of whether those reservations are located in an arid climate or a water-rich area, the issues which confront their use of water.

Finally, we will examine the Federal policy which favors negotiated settlements of competing claims to water as the desired alternative to litigation of such claims.

We will ask those from State and Federal Governments what their experience has been with the negotiation process, what changes or improvements in the process may be warranted, and their views on what parties to a negotiated settlement can anticipate when they bring a settlement package to the Congress for ratification.

Our first panel of witnesses consists of a distinguished professor of Indian law from the University of Colorado, Professor Charles Wilkinson, who will discuss the fundamental tenets of Indian water law.

Following the professor's presentation, we will hear from another widely-respected professor of law who formerly served as the executive director of the Department of Natural Resources for the State of Colorado, Professor David Getches. Professor Getches will examine the Indian water right as it exists within the context of a State system that regulates the use of all water.

The third member of the panel is a senior economist from the Environmental Defense Fund, Doctor Zach Willey, who is an expert in the economics of water, and the impact that changing economic trends have upon the manner in which water resources are developed.

Before we proceed, I would like to call upon my very distinguished colleague from Arizona, the vice chairman of the Select Committee on Indian Affairs, the Honorable John McCain, to make a statement.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, VICE CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator McCAIN. Thank you very much, Mr. Chairman.

I, like you, welcome this opportunity to hear from our distinguished witnesses on the Federal laws and policies relating to Indian water rights.

During the 100th Congress, we enacted legislation to settle several water rights claims in Colorado, Arizona, and California. As I understand it, as many as eight additional settlements will be ready for our consideration during this Congress.

In the State of Arizona we are working toward the settlement of claims regarding the Gila River, Fort McDowell, and White Mountain Reservations.

This hearing affords us all an opportunity to consider and reflect on the basic policies which form the basis for the tribal, State, and Federal Governments to bring about equitable negotiated solutions to water rights claims that would otherwise involve decades of contentious litigation.

I believe that the decision to negotiate or litigate can only be made by each tribe or State based on the unique circumstances of their particular claims. On the other hand, I believe it is clearly in everyone's interest to negotiate whenever and wherever possible.

Federal policy should clearly favor negotiated settlements. Not only are negotiated settlements probably less costly in terms of dollars, they tend to promote the very kind of cooperation and understanding which must exist if all parties are to be able to effectively utilize those water rights which are ultimately awarded to them.

I certainly do not mean to suggest that negotiation is the easiest method for resolving water rights. The issues are extremely complex and often very emotional; however, I believe that many tribes and States have demonstrated—including my own—that negotiation does work.

The settlements which have been authorized to date are all unique. No one settlement sets a precedent for any other settlement; however, each settlement reflects one unassailable fact: rather than spending appropriated funds to hire lawyers to fight one another forever, the parties to the settlements are able to use the appropriated funds to foster development and promote their economic well-being.

One of the things which we clearly need to address in this Congress is the manner and method by which these settlements are funded. It is simply unacceptable to use funds appropriated for programs and services in the Bureau of Indian Affairs to defray the cost of any settlement.

If we are to continue with a policy of promoting negotiations, then we must find an acceptable way of funding the ultimate settlements.

I understand that there are other difficult policy issues to be resolved. There is a very clear difference of opinion over whether and how tribes and States should regulate the use of tribal water off of the reservations. There are clear differences of opinion on the issue of cost sharing between the States and the Federal Government. There are also clear differences of opinion over the transfer of water from State to State. Finally, there is a genuine divergence of views over the very character of tribal reserved rights in the context of Federal reserved rights.

I am hopeful that this hearing will afford us all an opportunity to reach a better understanding of the issues involved in Indian water rights claims. If we are ever to reach a consensus on appropriate policy for these claims, we will all need to operate from the same basic understanding of the facts, law, and history which has been developed over the years.

Again, I thank you, Mr. Chairman. I am very pleased to see that you are back and in good health, having experienced a slight setback in the beautiful State of Hawaii. That's a terrible place to get sick.

Thank you, Mr. Chairman.

The CHAIRMAN. Once in a while we get sick there. [Laughter.]

Senator DeConcini, senior member.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much. First, my compliments to you and your ranking member, Senator McCain, for having these hearings on a very, very important subject—one that is, in my judgment, hard to really get a handle on and get your hands on it and understand it.

Looking at the witnesses here today, I think we're going to have a better understanding.

Mr. Chairman, over 50 lawsuits are now pending before State and Federal courts to resolve disputes over tribal rights to water flowing past, on, and over Indian reservations. Litigation, Mr. Chairman, is very costly time-wise and attorney-fee-wise. The uncertainty is a problem for everyone while the process goes through. And, once it is decided, it can displace existing water uses and provide only a paper decision and a paper victory—often that has to be funded, and sometimes can't be.

But the prolonged uncertainty clouds the future of determining what is going to happen with water rights.

As Senator McCain very properly pointed out, negotiation is the way to move, if at all possible. We, in Arizona, have certainly set an example, along with a couple of other States, in this important area of negotiation.

The under-funding of a negotiated settlement once the Federal Government has decided to be a partner is a real problem. These settlements that were negotiated last year with the administration—my compliments to them—require Federal funding for their participation in 1990 of $76 million; however, in the budget submitted, Mr. Chairman, as you have heard in the Appropriation Committee, only $15 million is asked toward these settlements.

How can you have a settlement if you are not going to abide by what you agreed to?

So I am hopeful, Mr. Chairman, that these hearings today will underscore and convince the administration with their representatives here that they need to go back and, perhaps with the Supplemental Appropriation Bill that is on its way, will agree to partially fund those settlements now if they can't do it in 1990. I don't think we can wait.

Mr. Chairman, I ask that the balance of my statement be printed in the record at this time.

Thank you very much.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Senator DeConcini appears in appendix.]

The CHAIRMAN. Senator Daschle.

Senator DASCHLE. Mr. Chairman, I have no formal statement. I commend you, in particular, for taking the initiative to hold a hearing of this import. For the reasons stated very eloquently by both Senators from Arizona, this is an issue that is as pervasive as any we will address the entire session of Congress. It has broad ramifications—both legal and economic.

I am very impressed with the list of witnesses we have before us this afternoon, and I am looking forward to listening to them.

Thank you.

The CHAIRMAN. Thank you.

Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman.

I, too, want to than you for holding these hearings. They are important to my State. I will waive my right to make an opening statement so that we can get at the impressive list of witnesses that you have scheduled for this hearing.

The CHAIRMAN. Now I would like to recognize a Senator who has no Indian reservations in his State, but throughout his years in the Senate he has served as a champion of Indian rights. He is the distinguished chairman of the Water Committee, and I would like to call on him now: Senator Bradley of New Jersey.

Senator BRADLEY. Mr. Chairman, thank you very much. I have no statement. I do thank you for allowing me to participate in this committee hearing of the Select Committee on Indian Affairs. I hope that one day we might have a joint hearing.

The CHAIRMAN. Thank you very much, sir.

Now I will call upon Professor Wilkinson, Professor Getches, and Dr. Willey.

Professor Wilkinson, please proceed.

STATEMENT OF CHARLES WILKINSON, PROFESSOR OF LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW, BOULDER, CO

Mr. WILKINSON. Mr. Chairman and Mr. Vice Chairman, thank you very much for your personal courtesies and for the honor of inviting us here on this important occasion to discuss one of the most pressing public issues in the American West—Indian water policy.

For my written statement I provided the committee with one of my law review articles on western water law, but I will present my oral testimony in a somewhat different fashion.

I would like, in the brief time allotted to me, to discuss the central premises for Indian water law and policy in the American West.

The context is established by a key fact of constitutional law long unappreciated by the citizenry, but increasingly recognized by the public, including State officials, such as the governors of Washington and Wyoming, who have recognized tribal sovereignty during this calendar year.

The Congress, the Presidency, and the Supreme Court of the United States have recognized this doctrine from the beginning days of the republic. The principle is that nearly all of us learned it wrong when we were told by well-meaning teachers at all levels of education that there are two levels of government in the United States—the Federal Government and the States. Instead, it is now resolved—resolved beyond any reasoned controversy—that there are three sources of sovereignty in our Constitutional democracy: the United States, the States, and American Indian tribal governments.

Unlike Federal and State government, tribal sovereignty was not created by the Constitution. It pre-existed 1787 by several thousand years. But tribal sovereignty was recognized by our national charter and continues in force today.

It is useful to set the progression of government in the American West, where nearly all of the Indian water rights disputes exist, in chronological order.

The tribal governments were there first. That is not a statement made out of sentimentality. It is an historical, sociological, and legal fact. The tribes initially governed themselves by their own laws. Then the United States acquired land and sovereignty in the west to the exclusion of all foreign nations, but not to the exclusion of Indian tribes. From the beginning, the United States recognized tribal property rights and tribal sovereignty.

Importantly, all three branches of the U.S. Government acknowledged a high and special duty to Indian tribes—a trust relationship. The trust was not developed arbitrarily. It fairly reflected the exigencies of history, of transfers of real property, of commercial trade, and morality. Thus, the trust was imbedded from the beginning.

The third kind of sovereignty was represented by the States, carved by the United States out of territories in the west. Of course, this third kind of sovereignty has its own kind of dignity and importance.

The States stood for the frontier, for local control, for diversity, and a sense of opportunity perhaps unparalleled in the history of the world.

The U.S. Government has always given the States broad sway in recognition of the value of government at the local level close to the people. But, from the beginning, the State governments were not close to all of the people, and, from the beginning, the Federal trustee kept Indian issues away from the States—away, as the Supreme Court put it in the 1880s, from local hostility and ill feeling.

In the area of western water, this tripartite relationship led to three great events of law and policy. The first event was the formulation of the prior appropriation doctrine of water law. Importantly, this rule was announced not by the State legislatures, but by the State courts. The by-word for prior appropriation was "First in time, first in right." The first user on a stream got firm, vested property rights to water, and each succeeding junior came next in line.

Thus, take a stream with five water users. The first user, A, appropriated water in 1880, B in 1881, and so on through C, D, and E. Each of those users appropriates 25 units of water. There is no sharing under prior appropriation.

Western streams are highly variable. If, in a given year, there are 125 units of water, each of those 5 users get his or her 25 units. If, however, there is only 100 units of waters in that stream in a particular year, the junior, E, gets no water at all. And in a flow of 75, only A, B, and C get water. And in a year of low flow, 25 units, only A gets water. A gets the entire stream.

Western courts, as a matter of common law reasoning, reached this simple, basic, and wise rule because, in their view, it best fit an arid climate and the needs of the mid 19th century. It provided stability for the new settlers who were heading west, and most of whom depended upon farming. In the American West, you can't farm without water.

It provided stabilities, too, for the cities that were beginning to grow up, and who also needed to depend upon a reliable supply of water.

If you had your seniority, you had your water.

The courts made these judgments, granting settlers property rights and water.

The second over-riding event was the Winters Doctrine, named after Winters against United States decided by the Supreme Court in 1908. But the rule in Winters is best understood as far preceding 1980.

In the controversy giving rise to Winters, the Fort Belknap Reservation in Montana had been established in the Milk River country in 1874. The U.S. negotiators, seeking to provide the tribal leaders with an incentive to transfer away nearly all of their land and to relocate on much smaller parcels, made strong promises to the tribal negotiators—promises of protection, of loyalty, of a homeland, of farm land.

The promises varied in their particulars for each of the tribes in the West, but the purposes—to provide a secure homeland, a place to live, and usually a place to farm—was set out in nearly all of the treaty and agreement negotiations.

Water was not specifically mentioned in most cases, but security and prosperity and loyalty and agriculture were mentioned.

Henry Winters and others homesteaded about a generation after the creation of the reservation in the Milk River Valley in the early 1890s. They took out water in good faith in the early 1890s. The tribe, also in good faith, took out water for irrigation in 1898—the reservation in 1874, the non-Indian homesteaders in the early 1890s, and the tribal irrigation project in 1898.

In 1905, in the summer, the flows were low. The non-Indians were upstream, and the tribal fields dried up.

Faced with this conflict of equities, of cultures, of property rights, the lower courts and the Supreme Court all held for the tribes, finding that the tribe was senior because its reservation had been established first.

Under Montana water law and the law of all western States, you have to divert water to get a water right. The tribe hadn't done that, but its reservation was there first, and the promises were there first.

The Winters Doctrine was an attempt by the Supreme Court of the United States to mesh Indian water rights and water rights under State law. Like the State supreme courts, the U.S. Supreme Court relied upon common law reasoning and tried to fashion a result from the land, the economy, and the cultures. And, like the State court, which had adopted a parallel doctrine, the U.S. Supreme Court recognized hard, vested property rights.

Winters' rights are property rights protected by the fifth amendment of the Constitution; thus, the Winters Doctrine flows from the treaties, and, even more basically, from the Indian sovereignty and property rights that far pre-existed the treaties.

Winters was announced in 1908, but the court announced a rule of property law formulated from events occurring much earlier.

The third great event in Indian water policy had to do with the ambitions reclamation program that began with the Great Reclamation Act in 1902. This was the program that built the great dams in the American West. The dams, from the beginning, were heavily subsidized in order to promote settlement. It, in fact, was one of the largest programs of subsidies ever undertaken by any government in this history of the world.

The problem with the reclamation program is that Indian tribes were essentially excluded. And, worse than that, on most—not many, but most—western rivers, irrigation projects were built on the very same streams that held Indian reservations, and the precious water was diverted to non-Indian fields rather than to tribal irrigation land.

The National Water Commission, in 1973, called this one of the sorriest chapters in the Nation's treatment of Indians. The truth is that if the United States had acted as a trustee during this era and had included Indians in the reclamation program, we almost certainly would not be here today.

My suggestion is that this body ought to consider these general principles in dealing with Indian water policy: First, acknowledge that Indian water rights are, like water rights created under State law, vested property rights. Winters' rights are legitimate, real property rights, and were recognized by our highest court for good reason—reasons just as good as the rights under prior appropriation recognized by the highest courts of the States.

Second, even in a time of extreme budget stress, this Congress should acknowledge the special justifications for Indian water projects. It was wrong—profoundly wrong—to deal Indians out of the reclamation program. That cannot be fully rectified, but we can make a beginning.

Third, we ought to acknowledge that Winters' rights ought to have at least the same rights of transfer as do water rights under State law. In other words, if a particular diversion point can be transferred under State law, if that diversion point happens to be an Indian water right, it ought to be transferrable also. That is good faith, good economics, and good law.

Let me say this by way of summary: Winters' rights today are, in fact, vulnerable, but that is only because of the politics of numbers. The Winters Doctrine is built upon piercing wisdom. It is built upon social equity, upon dealings made in the field between governments—the United States and the Indian tribes. It is based upon a fair reading of the purposes of those doctrines.

The Winters Doctrine is based upon notions of economic stability, and it was created because of the enlightenment of a great and good society.

Winters is a sound rule of property law, and, more than that, it is a monument to minority rights, and ultimately to the rule of law.

No one can tell an individual Senator what it means to be a trustee for Indians. That trusteeship, in that context, cannot be enforced in the courts. But, by hewing to Winters and its wisdom and the obligations that it fairly entails, you will have proved yourselves to be trustees in the highest and finest sense.

Thank you very much.

[Prepared statement of Mr. Wilkinson appears appendix.]

The CHAIRMAN. Thank you, Professor.

May I now call upon Professor Getches?

STATEMENT OF DAVID GETCHES, FORMER EXECUTIVE DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES, COLORADO AND PROFESSOR OF LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW, BOULDER, CO

Mr. GETCHES. Thank you, Mr. Chairman and members of the committee and Senator Bradley.

My name is David Getches. I am a professor of law at the University of Colorado at Boulder. I very much appreciate the invitation to address the committee on some very important Indian water policy issues.

My own interest and involvement in the field of Indian water law is rather diverse. Besides teaching water law and Indian law, I have written several books and articles in the area. As the founding director of the Native American Rights Fund, I participated in a number of Indian water rights cases on behalf of tribes.

More recently, from 1983 to 1987, I served as the Executive Director of the Colorado Department of Natural Resources. In that position, I had policy-level responsibility for the water issues being dealt with by the State of Colorado, and had an opportunity to deal with Indian water law issues. During my tenure we initiated and concluded negotiations with the Southern Ute and Ute Mountain Ute Tribes. Those negotiations were concluded in a final settlement agreement that was signed in December 1987 and which became the subject of the Colorado Ute Settlement Act passed by Congress last year.

It is from this special perspective that I gained as a western State government official that I have formulated my comments to this committee today. My observations and recommendations are elaborated upon in my written testimony, which I have submitted to the committee. I address in that testimony three general problem areas that I will summarize this afternoon: First, the need to synthesize and make effectual the announced Federal policy favoring negotiations; second, the need to clarify and strengthen the nature and extent of the Federal financial commitment to Indian rights settlements; and, finally, the importance of recognizing and supporting the rights of Indian tribes to market their water, including the enactment of Indian water leasing legislation.

First, there is need to synthesize and give meaning to the Federal policy that favors negotiation. It is a policy that several administrations have supported and Congress has ratified by its actions. From the start of our effort in Colorado, we recognized that neither the objectives nor the interests of the State of Colorado or of the two Ute tribes could be very easily or precisely achieved through litigation.

Negotiation provided an opportunity to lay the practical problems of all the parties affected—both Indian and non-Indian—on the table, where they could be the subject of a search for solutions.

Now, at the outset I was encouraged by the announced Federal policy of negotiating Indian water rights matters, but the policy proved to be somewhat hollow given the performance of the United States in the negotiating process. The policy simply is not calculated to succeed in practice. The role of Federal representatives did not resemble anything that I associate with a fiduciary whose paramount duty and interest is to further Indian rights and Indian well being. And the Federal Government was unable to speak with a single voice.

We had large numbers of Federal representatives sent to our early negotiating sessions. But it soon became obvious that we weren't making constructive progress with the United States, although the tribes and the State and the local water users were all talking to one another, communicating, and making progress among ourselves. Indeed it was the Indian representatives who first suggested that the Federal representatives be uninvited to a series of negotiating sessions in order to make greater progress.

We would have hoped that the Federal representatives would be there to assist, to sharpen, to strengthen, and give tangibility to the Indians' position, but they didn't furnish that kind of support. They had unresolved conflicts among themselves. They sent negotiators without authority. They were unable to speak on many issues with binding authority.

The Departments of the Interior and Justice ultimately did sign the agreement that was negotiated, and credit for that goes to a few particularly effective and committed individuals within those departments. They pulled the administration together for the precarious finale of the negotiations.

I might add that Congressional interest and pressure was also indispensible in this process.

The administration was little help, however, when the task became advocating the settlement agreement and pressing the need to hold together the terms of that agreement once it reached Congress. The tribes and the parties were on their own throughout that difficult legislative process with which many of you are quite familiar.

I would like to offer some recommendations to address the problems we encountered.

First, the administration should articulate a policy to give meaning to the long-standing Federal commitment favoring negotiated settlements. The policy will have to be specific enough to remove the surprises and the uncertainties that have plagued recent settlement negotiations. The policy should favor dealing with the allocation of authority between States and tribes for the regulation and management of Indian and non-Indian use on the reservations.

When negotiating Indian water rights issues, the United States should delegate a high-level representative who can resolve internal conflicts within the Federal establishment and then attend the negotiating sessions able to make binding commitments and statements of policy on behalf of the government—statements that will be honored by the administration and defended in Congress.

Futhermore, I believe that Congress should as a matter of its own policy, respect the agreed terms of settlements among the parties to Indian water rights negotiations. While it may be necessary to inquire into important national interests that haven't been considered by the parties, the fundamental components and structure of a settlement packages shouldn't be disturbed.

Second, the Federal Government needs to clarify and strengthen the Federal financial commitment to Indian water settlements. That became apparent to us in our negotiations on the Colorado-Ute settlement, and it became extremely important recently as Congress was called upon to implement that settlement through continued funding. As the committee is aware, the administration's budget proposal to implement the Colorado-Ute settlement is merely a token.

Like other settlements, ours included a Federal investment in water development facilities, it included significant non-Federal cost-sharing requirements, and it included the creation of a substantial Indian trust fund for the tribes to use as they determine—a trust fund made up of both Federal and non-Federal contributions.

The success of the Colorado-Ute settlement—and the success of the other settlement agreements that were approved by Congress in the last year—was only possible because Congress was willing to contribute funds that exceeded the estimated cost of litigation, though not by much. This contribution recognized a trust relationship broader than a duty to engage in a pro forma defense of legal rights, and it incorporated a policy of equity toward non-Indian water users. But the Executive in our negotiations was unable to negotiate anything but the cost-sharing issue. It lacked authority on all other issues.

One of the few official positions announced with any clarity was that the administration considered its obligation to protect Indian water rights to be limited to engaging in litigation; thus, the trustee's perceived obligation did not include participating in the burdens of making Indian water rights useful and productive, let alone the burdens of relieving the equities of non-Indian water users. This issue, the extent of the trust obligation and the broader national interests that implicate equities of non-Indian water users, needs to be addressed by the administration.

In its Indian water rights negotiation policy, the administration should make statements consistent with Congress' practice of recognizing a trust obligation that reflects legal, economic, social, political, and cultural interests of tribes, not just the right to litigate.

The other uncertainty regarding Federal financial contribution to these settlements is in the future funding necessary for their implementation. Means need to be found to ensure that the United States keeps faith with the agreement financially so that the agreement doesn't collapse 1 year, 2 years, or 5 years later for lack of funding.

I recommend that in approving an Indian water settlement that requires Federal financial participation, Congress should make as strong a commitment as it can for the future. For instance, a bill could incorporate mechanisms such as penalties against the government or special concessions for the benefit of tribes and other parties in case funding is not forthcoming in a timely manner.

Third, the final area that I will address is the need to recognize and support the rights of Indians to market water.

Western water users today are turning increasingly to more efficient management of existing resources as an alternative to major water development projects. Sound principles of economics and public policy dictate that water be moved to the most productive uses; therefore, the major share of water belonging to Indian tribes shouldn't be locked into inefficient uses by restrictions on marketing.

We in the western States expect Indians to play by the rules of our State water law systems, and legally they must. Except for the fact that reserved rights need not to be put to use in order to perfect or maintain them, these rights are incorporated into the operation of the prior appropriation system. The rights of tribes are subject to curtailment based on their priorities relative to other water rights holders, as Professor Wilkinson explained, and they may not exceed their decreed quantity. Under the McCarran amendment, State water rights adjudications are used to determine the quantities of Indian rights.

If Indian rights are to be integrated into our State water law systems, it seems unconscionable to deny Indians the benefits enjoyed by other water rights holders in that system. Appropriators in our State water law system can apply their rights to new uses and agree to leases and other arrangements that permit others to exercise their rights. There is no reason that tribes should not be able to engage in water marketing—subject to the same rules and limitations that apply to other parties under the State system. It is especially odd to deny Indians a benefit that actually serves the goals of the emerging western water policy of efficient water use.

What does water marketing mean in the hands of Indian tribes? Let me give you some examples of how water marketing can work, examples that work beneficially not only for the tribes, but for non-Indians.

Water marketing could mean a tribe leasing the right to use some of its water to an off-reservation energy company. It could mean a tribal agreement not to develop water on the reservation for a time in exchange for a payment to the tribe so that an irrigation district can count on a dependable supply. It could mean a contract that would compensate a tribe if it agreed to stop irrigating in a drought year so that a vital industry would have enough water in that year. It could be an arrangement whereby a city might pay for lining ditches on the reservation or constructing a modern water-saving irrigation system on the reservation in exchange for the right to use the conserved water off the reservation.

The flexibility to enter into such deals is of potentially enormous value not only to Indian tribes, but to the States and their non-Indian citizens. It was a recognition of these benefits—particularly the benefits to non-Indian water users—that lead the National Water Commission, in 1973, to recommend that Congress enact legislation authorizing the leasing of Indian reserved water rights. There is legislation already on the books—the Indian Lands Leasing Act—that allows tribes to lease their lands with the approval of the Secretary of the Interior, but not water leasing legislation. The Commission suggested that allowing leasing of water rights would help overcome the problems of uncertainty caused by the Reserved Rights Doctrine.

A stingy approach to Indian water marketing—which, frankly, was evidenced in some of the Congressional acts authorizing settlements last year—serves to limit the practical utility and the value of Indians reserved rights. It is simply a backhanded way of diminishing the quantity of rights that the tribes own. In our negotiations, the State of Colorado perceived no legitimate interest in discriminating against Indian water rights with respect to marketing.

Congress does have an important function in reviewing Indian water marketing proposals. No conveyance or alienation of Indian property can take place without the approval of Congress. That restriction—the Indian Non-Intercourse Act—is for the protection of Indians and their property; consequently, the primary role of Congress in exercising its authority under the Non-Intercourse Act presumably is deciding whether the proposal is in the interest of Indians or whether it is an improvident disposition of Indian property. Contrast that role with the outcome of Congress' alterations to the Colorado-Ute Settlement, which, as enacted can actually subject tribal water rights to loss through abandonment and forfeiture—a result that would have been impossible under the agreement the State, tribes, and non-Indian water users negotiated.

I would like to conclude with the following two recommendations relative to Indian water marketing. First, the administration and Congress should adopt and implement a policy of maximizing the ability of tribes to market water held under the Reserved Rights Doctrine or otherwise. Federal negotiators would advocate on behalf of tribes for the right to market water. Congress would never not modify a settlement agreement to make it more restrictive as to marketing than the parties have agreed unless the agreement was manifestly inconsistent with the Federal/tribal trust relationship or with an overriding national interest.

Finally, Congress should consider legislation generally authorizing tribes to lease their water for use off reservation—an Indian Water Rights Leasing Act. The shape and content of that bill should be developed in consultation with tribal leaders, their attorneys, and also the parties to recent settlement agreements who are familiar with the issues.

I believe that all these recommendations would be sound for the States, beneficial to the Indians, and good national policy.

Thank you.

[Prepared statement of Mr. Getches appears in appendix.]

The CHAIRMAN. Thank you very much Professor.

Dr. Willey.

STATEMENT OF DR. ZACH WILLEY, SENIOR ECONOMIST, ENVIRONMENTAL DEFENSE FUND, OAKLAND, CA

Mr. WILLEY. Thank you, Mr. Chairman.

I come to the committee today, not as a particular expert in Indian water matters, but from several other perspectives that bear on Indian water policy today.

The first perspective is a personal perspective of being a westerner—born in Oregon, raised in California—coming from agricultural and logging families in the West, raised during the height of the water development era in the western States, watching Federal projects being built in California and elsewhere in those years, and, at the same time, being very unaware of the plight of Native Americans during that same period. In fact, the town that I was born in, at the time that I was born in it, in Oregon, had an Indian reservation terminated. The Klamath Tribe Reservation was terminated in the late 1940s, at the same time that I was born in that town.

The plight of North Coast Indians in California, whose cultures are based on fisheries in which the Federal reclamation project in California had built dams to divert flows of the Trinity River into the great Central Valley for reclamation irrigation contract water use thereby degrading the fisheries upon which those cultures are based—those were all developments that weren't particularly visible to a western kid growing up in those days.

I also come to you as a professional economist with 20 years of experience in western water issues—particularly in California, as well many other Western States.

It is from that latter perspective I would like to address you today.

I have submitted testimony that is lengthy with figures, tables, and attachments, including a journal article published last year that discusses a number of Federal water policy reforms from an economic and environmental perspective. There is some discussion in that article of Native American issues, but, again, I am not a Native American policy expert.

I would like to make several points in summarizing my written testimony.

I think it is important to understand that when water policy is discussed in the West and in the manner in which it has been discussed during the last 10 to 15 years, there are a number of falsehoods that tend to arise. I would like to dispel those falsehoods.

The first falsehood is that there is an inevitable conflict in the Western States among the growing urban centers, the environment, and tribal water claims, and that the only way to resolve those conflicts is to take from one of those interests and give to the other.

The second falsehood that we often come across in discussing western water issues is that irrigated agriculture—which, in the Western States, uses approximately 80 percent of all water used in an averaged year—is unwilling to relinquish any portion of that water under any conditions. That is a falsehood that is constantly raised, particularly by non-Indians, in discussion of alternative resolutions of tribal claims where Indian water supplies are sought to resolve those claims. It is also a falsehood that is raised in many environmental discussions in the west wherein we seek to rehabilitate lake, river, wetland, and other environments that have been degraded over the last 50 years.

Those falsehoods lead to a perception of unpleasant trade-offs, and those unpleasant trade-offs lead to conflict, and that leads to litigation. I believe that is a major factor in why we have had so much litigation regarding tribal water claims. We have also had another body of litigation involving the environment. In fact, one could characterize the last two decades as "the era of water litigation of tribal and environmental claims in the Western States."

I think we are at a crossroads now with respect to both tribal and environmental claims, and that we have seen, by experience, what litigation can and can't do for us in terms of resolving these conflicts. We need now to go on from there and decide how we're going to bring the society along during the rest of this century to resolve those claims.

The falsehoods that I mentioned are based on a system that doesn't take into account an incentive-based means of allocating water. What I mean by "incentive-based system" is a system of reallocating water voluntarily from willing sellers, as opposed to a system which takes water from one user and gives it to another by regulation or litigated outcome.

An incentive system can dispel those falsehoods in several ways. First, an incentive system, if put in place, can stimulate water conservation—and you have heard water marketing mentioned. Water marketing is a very elegant way of implementing an incentive system. It gives people a choice. It gives irrigators and other holders of water rights and users of water rights the ability to make a choice individually as to how they want to allocate that water and conserve water. It gives them an opportunity to reduce their use, and do it in a way in which they are compensated.

From a Federal policy perspective, we have heard about the appropriation problem of appropriation and financing of Indian settlement legislation. The water marketing possibility, which stimulates water conservation in the agricultural sector and the municipal and industrial sectors, is, by far, the least cost way of finding new water supplies for the tribes.

So, from a Federal appropriations perspective, we can expect that we'll get more bang per buck if we can implement a system that conserves water than if we attempt to resolve those claims in other ways.

The last 100 years in the west have been an era of agricultural and water development. I think the next 50 years, at least, need to be an era of conservation and retrofit of the water systems of the west. That era will require investments in the same way that the reclamation era required investments, but that truly is the least conflict and least cost way of settling tribal water claims and reclaiming various environments in the West.

Let me cover a few facts behind that statement—and these facts are discussed in some detail in my submitted statement.

Over the past 20 years, the population in this country has been increasing by over 1 percent a year. In the west the rate of increase is greater. The Sun Belt and the Pacific Northwest are among the highest growth areas in the country. Unless we have some new breakthrough or change in immigration policy, migration policy, or birth control policy, there is no particular reason to expect that there is going to be a dramatic change in these trends in the next 30 to 50 years. There are going to be a lot more people in the West, and they'll have water needs.

At the same time, the economic growth in the West outstrips economic growth in most other areas. With that, the demand for water is increasing. Particularly when one adds growth in the municipal and industrial sectors to tribal water claims and environmental needs to reconstitute western recreational resources, one finds a large block of growth water anticipated during the next 30 years.

At the same time, the basis for development in the West—which was agriculture—is no longer a growth industry. In 1954, we had approximately 27 million acres of irrigated land in the western States. We peaked around 1978 at 43 million acres. We've dropped off somewhat since then. Agriculture is no longer a growth industry.

There are reasons for that. They are basically economic reasons, not water supply constraint reasons. Essentially, a good portion of irrigated land in the west is irrigated for field crops. Field crops are crops like cotton, alfalfa, sorghum, wheat, barley. These are crops which generally have a low economic value. They have been a staple in the development of the West, but as the development of the Third World has progressed, particularly since World War II, there have been huge amounts of irrigated acreage of those crops brought into production in other areas.

For example, entire regions of Pakistan and Indian in one fell swoop have come into irrigation in dimensions that are as large as all irrigation in California. That has had the predictable impact on world commodity prices of bringing those commodity prices down, thereby making the production of those field crops less profitable than they were perhaps before World War II.

We don't see that that development is going to change. Many parts of The Third World are in an agricultural take-off. There will be more of these commodities on the world market.

What that means is that water used in those crops has a low value. A farmer who is a businessman and has an opportunity to do something else with that water may take it. We know that there are many farmers in many western States who look at it exactly that way.

I have attached, as attachment 2 of my testimony, a story in this week's "Time Magazine" regarding a project involving farmers in California and Mono Lake, which my organization is involved in, which is basically arranging water marketing and leasing transfers based on conservation investments in irrigation districts—willing irrigation districts—to move that saved water on behalf of the Mono Lake ecosystem. I believe that there are opportunities similar to that throughout the western States. There are farmers throughout the Western States who will respond to that incentive if it is presented.

I have to say that there also is a segment of western agriculture who wouldn't sell their water for anything. To them, farming is a lifestyle more than a business, and they won't be interested in the opportunity of selling water. To them, the voluntarism of water marketing means that they have the right to decline water sales opportunities.

What are the options for resolving Indian water claims? There are basically three: New supply projects, either surface or ground; water conservation; and reallocation from agriculture. A look at the rough numbers of costs in those different areas confirms what I have already said, which is that conservation and reallocation from agriculture are, on a per-acre-foot of water basis, by far the cheapest options to fulfill tribal water claims or other new water needs.

Rough numbers in California, for example, show new surface supplies costing over $3,000 an acre foot in capitalized value, whereas, on a comparison basis, some types of agricultural water conservation investments can yield, on a per-acre-foot basis, new water for less than $1,000 an acre foot. At the same time, in the field crops that I mentioned, their net value tends to be less than $700 or $800 an acre foot on a capitalized basis.

With those rough numbers, we can see that, for example, if we wanted to develop a reservoir to fulfill an Indian water claim or an environmental need—or an urban need, for that matter—we might wind up paying three, four, or even more times more than we would pay if we were to invest money in agricultural water conservation or compensate farmers to switch out of field crops.

What does that mean for policy choices? We have heard about water marketing and the opportunities which it presents for Indian Water Policy. Water marketing is clearly the most sensible western policy that the Federal Government can pursue. The Bureau of Reclamation, in its mission reorientation statement in 1987, endorsed the concept of water marketing, with a number of caveats.

I think that we must have a much stronger statement on water marketing and a much stronger signal to the reclamation farmers that water marketing is an option for them. I think that strong signal will not come from the Bureau of Reclamation, but that Congress needs to send that signal to reclamation farmers saying it is okay to engage in water trading, transfers, and conservation.

I think we also, as a policy matter, need to think more about outright acquisitions for public uses from these willing sellers of water, whether they be agriculture or other. The Mono Lake project is an example of that. That is a cost-share arrangement that involves a Federal interest, a State interest, and the interests of the city of Los Angeles. Those kinds of cost-sharing arrangements which basically finance agricultural water conservation, or other types of conservation, have great potential in the tribal area. Settle Indian claims by buying portions of existing reclamation projects' supply, and compensate the farmers.

Indian water policy: My impression is that there are five elements that need to guide Indian water policy. The first one, which was nicely articulated by Charles Wilkinson, is the need to respect tribal sovereignty and independent governance of tribes.

Second, economic development of the tribes is a must, and water policy must address those needs, in ways that involve Federal appropriations and/or other mechanisms that result in income to tribes. Water marketing provides that opportunity for income for the tribes without major appropriations, or at least with reduced appropriations.

Third, you have heard an explanation of the Winters Doctrine. The problem with the Winters Doctrine is that it constrains the definition of a tribal water right to an agricultural use. The problem with that is that the economics of agricultural uses are changing dramatically. The Winters Doctrine ought to be expanded to address other possible tribal claims, such as fisheries and other uses consistent with those cultures.

Fourth, Water marketing can become an option for tribes with some kind of an amendment to the Non-Intercourse Act. This would give the tribes the ability to look at water marketing opportunities as part of their water settlement negotiations.

Fifth, There is insufficient time to discuss water quality and Indian water policy. That is another complicated area. It is discussed in my written statement. It is also discussed in the journal article that is attached to my written statement. I will not try to go into that today.

That concludes my statement. Thank you very much.

[Prepared statement of Mr. Willey appears in appendix.]

The CHAIRMAN. I thank you very much, Doctor.

I would like to start off by asking a few questions. All of you have mentioned the injuries that have been brought upon the Indian nations by the Reclamation Act.

Professor Wilkinson, you suggested that something should be done to rectify this. What do you suggest we, in the Congress, should do to provide redress to these wrongs?

Mr. WILKINSON. I would just say very briefly—and perhaps my colleagues would want to add to this—one thing I have seen with modern tribal leaders is that it is not their interest to attempt to, in some abstract way, raise feelings of guilt or abstract feelings of injustice about past Federal policies that may have been wrong.

I think that they present their case in a very pragmatic way, which is to recognize, as a fair-minded observer, that a wrong policy choice was made. That particular policy choice—and I think of the reclamation program as being one of the two or three most important Federal policies that has ever been adopted concerning the American West. It is that important.

So, with the tribes having been substantially excluded from that, it seems to me Congress ought to start from that point. I don't think that it is possible or wise to somehow attempt to create a series of Indian irrigation projects that would somehow equal the amount of money that they didn't receive for projects during that time.

But I think Congress should act on that and recognize that there is a special reason for providing funding for Indian water projects—which could be a fish hatchery, which could be conservation funds, as Doctor Willey suggests, perhaps—well, at Pyramid Lake, one example would be that one way to achieve partial fairness there would be for the Federal Government to fund conservation in the Newlands District, and that would be a way of attempting to reconstruct the situation. You see that on many other stream systems in the west.

Another proposal that he had was to, perhaps on a particular stream, buy out individual farmers. They might be willing sellers.

I think the policy has to be flexible, because there are good reasons why we are not building the big dams any more and why we can't and perhaps shouldn't do that for tribes, but we ought to recognize that policy failure that I think existed beginning around the turn of the century, and then, in a flexible way, try to react to it and recognize that it is a special, unusually well-justified expenditure for Congress.

The CHAIRMAN. I believe most of us in this assembly would recognize that marketing of water would be a right, that water rights should be a vested property right. But, in order to have this right be a reality it has to be exercised somehow. I think all of us will have to admit that there are powerful forces in the administration, and also in the Congress, who have, over the years, fought against the extension of such rights.

For example, in some of the settlements, in order to get the settlement through I have been advised that Members of the House and Senate have demanded that marketing rights be deleted before such settlements are signed.

Keeping that in mind, what do you think this committee can do? I, for one, am prepared to introduce legislation to recognize marketing. And yet, if that fails, that might be looked upon in some court cases as the will of Congress— that they are against water marketing by the tribes or the authorizing of leasing of water. We are in a quandary. We have much to do in educating ourselves and the people of the United States. That is why we are here.

Mr. WILKINSON. Let me throw out one possibility, Mr. Chairman—and, again, my colleagues may want to comment on this. One premise I have is that over the next 2, 3, 4, or 5 years, the politics on Indian water marketing is going to change. It is going to change for a number of reasons, but maybe the most fundamental one is that there are important sectors of the non-Indian economy that have, in their self-interest, the promotion of Indian water marketing, and they basically are the entities that do not now have water rights. That includes some energy companies and some cities. They have, as their well-identified self interest, to have more water on the market.

I think that there has been some knee-jerk reaction against water marketing that is going to change by some interests. I think, also, as the issues become more clear—and perhaps particularly for Senators not from the west who don't have constituencies on the issue who may see the equitable question as simply being that Indian water transfers should be treated the same as non-Indian transfers.

So my expectation is that the politics already are changing and will change.

Now, one thing this committee could do—and this is the recommendation of one person, and I think that it is more important on how tribal leaders feel on this, but I will throw it out as my own sense—is that the Senator, with co- sponsors, could introduce an Omnibus Indian Water Marketing Bill for hearings and debate.

What the bill would be is this: the Non-Intercourse Act prohibits transfers of Indian property. That has been in effect since 1790. Congress has made exceptions to the Non-Intercourse Act and now has programs that allow transfers of some Indian property. As a result, we have timber sale statutes, grazing leases, land leases, oil and gas, coal, and those are all comprehensive statutes tailored to that specific resource that are, in fact, an exception to the Non-Intercourse Act.

Now, it seems to me that it is logical to begin investigating whether water should be treated in the same fashion, and to have at least a bill on the table that would allow water marketing—with the understanding that a tribe would not, of course, be required to do it; it would simply leave options open to the tribe. It seems to me that it might be excellent to provide a forum for that with the clear understanding that there is strong opposition to it now. But my guess is that's going to wane, and that maybe this is the time and the way to begin the debate.

Mr. GETCHES. Mr. Chairman, may I add that a benefit of having hearings on a bill—whether you call it an Omnibus Marketing Bill or an Indian Water Rights Leasing Act, as I have proposed in my testimony—would be an opportunity to clarify misunderstandings about the nature of Indian water marketing.

Opposition to Indian water marketing is built, I believe, on a lack of understanding of what it means and what the consequences would be. If it were understood by the opponents of that concept that, one, it is consistent with State water law under our system of prior appropriation, and, two, it can be for the benefits of States and non-Indian water users, as well as for the benefit of Indians, I think that you will find the opposition drop away. That's not to say everyone can be convinced, but I think that much of the opposition is based on misinformation.

What are the risks of failure? I don't think a court could make much of it because, at this point, there is no authority to market water. It depends on an act of Congress. The will of Congress was determined 200 years ago by the Non-Intercourse Act. It says that water can't be marketed without Congressional authority. A set of hearings and a failed proposal couldn't make that any stronger.

Mr. WILKINSON. I would just add that there is a powerful irony at work here, because 30 years ago Arizona—and Arizona was one State that was one of many in this situation—essentially prohibited transfers by making water rights pertinent to the land. They had to stay with the original land that they were attached to.

But water marketing is very much in vogue in the American West in 1989. The western governors had a major report that came out two years ago that made marketing one of the centerpieces of its water efficiency recommendations.

The market, along the front range of Colorado and New Mexico, Arizona, and Southern California, is alive and well, and it is a regular, thriving market, and is supported by the political interests in those States, and strongly so.

There are problems. You can dry up a farm community and you can injure the stream if you don't handle a transfer in the right way, but the idea of water transfers is central to enlightened water policy in the west, and I think that applies in literally every State.

In the area of Indian water rights you have had objections, and I do not see a principle distinction.

Mr. WILLEY. I just wanted to add that the water marketing project that I mentioned in California on behalf of Mono Lake involves Los Angeles and some of the Southern California cities, and that project would not have been possible 5 years ago because the Southern California interests didn't recognize the definition of the term "water marketing" as a water policy option. They wanted to talk about water sharing, water transfers, but not water marketing. So there has been quite a change in attitude, to sort of reiterate what Charles Wilkinson said.

The CHAIRMAN. Senator McCain.

Senator McCAIN. Thank you, Mr. Chairman.

Just a brief comment, Professor Wilkinson, water marketing is a big and very contentious issue in my State. Our legislature is considering numerous pieces of legislation to restrict what is happening, and the view that it is acceptable I think flies in the face of the opinion of many people in my State, including those who live in rural areas that see their future economic development passing before their very eyes.

Professor Getches, if tribal-reserved water is used by non-Indians off reservation through lease or other arrangement, what law should apply: tribal or State?

Mr. GETCHES. If it is used off the reservation and it has been marketed to non-Indians, as we have hypothesized, State law would apply. The exception to that is that the right wouldn't be lost by non-use.

Senator McCAIN. If tribal reserved water is transferred across State lines by use by non-Indians off reservation through lease or other arrangement what law should apply?

Mr. GETCHES. First of all I should clarify that a transfer across State lines could implicate interstate compacts, and that is near and dear to our hearts as upper basin States, leery of the thirsty States downstream. I think we share, between the upper basin and lower basin, among all seven basin States, a belief that the Colorado River Compact and law of the river should remain intact until such time as all the parties believe that it should be altered in some way. Water marketing could upset that balance. I think that it will await the further agreement of the seven States to allow any water marketing across State lines.

Now, if we take it out of the compact setting and address your question, the issue of what water law would apply becomes more complicated.

First, the water law of the State of origin would apply to the ability to market across State lines. In Colorado we have a law that permits the marketing of water across State lines subject to certain restrictions. Those restrictions would have to be observed.

Then, the recipient State or importing State would also be able to exercise or impose its law on the way the water is used. For instance, if there were a duty of water requirement or water quality requirements, they would apply.

Senator McCAIN. Professor Wilkinson, are there significant differences, as a matter of law, between tribal reserved water rights and Federal reserved water rights?

Mr. WILKINSON. Senator, if I could just say one sentence in response to your comment earlier, needless to say, I defer completely to your knowledge of Arizona, but I intended to include the situation you suggested because that is a very serious matter—the drying up of farmland. I think that is probably not a problem in the Indian areas, as a general matter, but certainly there are serious problems sometimes with water transfers.

In response to your question comparing Indian water rights and Federal reserved water rights, I think the differences—to begin with, there are important, real-world differences. The idea of both kinds of rights is to fulfill the purposes of the reservation. The reservations are very different kinds of reservations, because Indian reservations have people on them and societies and farming, which uses so much water.

And so it is unresolved whether the court will use a different legal test in analyzing Federal reserved rights and Indian reserved rights. In the revision of the Cohen Treatise, of which I was managing editor, and Professor Getches and others were also editors, we concluded that a different legal test does apply. The Wyoming Supreme Court, for example, has cited the Cohen Treatise.

But, to me, that's not the larger question. The larger question is that there is going to be much more water for Indian reservations because the purposes are so fundamentally different and they include societies, towns, and irrigated farmland and ranch land.

Senator McCAIN. Thank you.

I know we are short of time, Mr. Chairman. I would just like to close with a comment that I have been a party to three negotiated settlements, and I must somewhat disagree with Professor Getches in that, while we did receive, particularly in the latest settlement with the Salt River Pima Maricopa Community—which was a very large settlement involving major cities and counties in my State, as well as the rest of the State—that we did receive substantial subsistence from a Federal negotiator who is going to appear in a later panel, who was empowered by the Secretary of the Interior to make very key decisions.

I think that all parties involved in those very complex negotiations would suggest that the role that he played as an individual—and many times it is individuals, rather than policies, that play significant roles in successes or failures — he was a very important element in moving this forward. That is not to say that there wasn't significant opposition from the Office of Management and Budget, as there always is on anything that costs money. Whether it be a Republican or Democratic administration, we always have the OMB, who doesn't want to spend any money. And then they compound the problem by sending over budgets which don't recommend appropriations for solemn agreements that we have made.

But I think it is somewhat of a charade that we play, knowing full well that we, as a government, must provide those appropriations in order to fulfill those obligations.

I am not in total disagreement with you, Professor Getches, but I think there are cases where we have seen the kind of role the Federal Government should play, although I am certainly in agreement with you that we do not have a coherent, overall water policy that we need very badly in order that we don't start from square one on every one of these negotiations as they proceed.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

If I may, I will now call upon my friend from New Jersey.

Senator BRADLEY. Thank you very much, Mr. Chairman.

Each of you talked about the need to have these negotiations settled and have the disputes settled. I am curious about any thoughts you have about how the negotiating process might be improved. Do we need guidelines?

Mr. GETCHES. Yes. I think we do need guidelines. I think some fairly specific principles announced by the Department of Interior, in coordination with the other Departments of the Executive, would be highly desirable. Hopefully that would be in consultation with the key committees of Congress so that the rules of the game, the playing field, is defined in advance.

I will add, in response to what Senator McCain said, that I know the individual of whom he speaks, and I will add my praise for that individual's role in our negotiations. The problem was that his hands were often tied.

Futher, in response to your question, I would like to re-emphasize my recommendation, that there be a Federal official with all the authority that he needs assigned to these negotiations. That is possible. It was done for part of the former administration, but with the change of a Secretary of Interior, that policy also changed.

Senator BRADLEY. Try to be as specific as you can. What should be included in the guidelines?

Mr. GETCHES. One, there should be a statement on the level of financial commitment; that is, that it will not be limited to litigation costs, but should take account of the tribe's economic and social needs.

Senator BRADLEY. Are you saying there should be a single policy for determining appropriate Federal share in any kind of settlement?

Mr. GETCHES. No; I think there is a danger in coming up with a formula, because it is impossible to anticipate each case. But the policy should be that the Federal financial commitment will not be limited to the litigation exposure of the United States. Secondly, it should express some concern for the equities of non-Indians who would be affected by a judgment if the matter went to litigation.

Senator BRADLEY. Anybody else have specific suggestions on guidelines?

Mr. WILLEY. I think it would be helpful if they had some kind of guideline that provides procedures for searching for willing sellers of agricultural water, and that might even be boiled down to: if you're looking for an Indian water supply to settle a claim in a particular area that has reclamation growers in the area, which most do, that some kind of a procedure for an RFP issuance to that district which offers a certain price for water sales from willing sellers in that district might be a useful way to bring water supply along without the usual intense level of contentiousness. This is not an approach that is without problems, but it seems to me that it has great potential as a part of these settlements.

Senator **BRADLEY**. Let me make sure I understand what you are saying. Are you referring to Bureau of Reclamation projects?

Mr. **WILLEY**. Yes; I think it is important to include Bureau of Reclamation projects in the context of these settlement negotiations.

Senator **BRADLEY**. So if I heard correctly what you are saying, you are saying that if water can be freed up through conservation or various other efficiencies, that Bureau of Reclamation water would be available or could be available to satisfy tribal claims?

Mr. **WILLEY**. Yes; and I suggest that it be done through an RFP process, which basically requests a response from reclamation irrigators as to a willingness to participate in that kind of program and offers compensation.

Senator **BRADLEY**. Any other suggestions on guidelines?

[No response.]

Senator **BRADLEY**. Don't look for suggestions. If they come, tell me, but—

Mr. **GETCHES**. I would add to Dr. Willey's comment that a policy of looking for ways to make existing reclamation projects more efficient would further the interests of the Indians, as well as the financial interests of the United States.

Senator **BRADLEY**. Who should develop the guidelines?

Mr. **GETCHES**. They should be developed under the leadership of the Department of Interior.

Senator **BRADLEY**. So the Department of Interior takes the lead?

Mr. **GETCHES**. Yes; the Secretary of Interior is primarily charged with the stewardship of the Indian trust responsibility. Of course, it extends to every corner of the Federal establishment, but leadership belongs there.

Senator **BRADLEY**. And who should initiate and facilitate the settlement negotiations?

Mr. **GETCHES**. Again I think it should be Interior. Obviously, if there is pending litigation—as there usually is in settlement negotiations—the Department of Justice becomes involved.

Senator **BRADLEY**. So you're saying that you think it should be initiated by the Department of Interior prior to anything being ordered by the courts in the context of litigation?

Mr. **GETCHES**. I think that is desirable. It would be my view that every one of the approximately 50 pending Indian reserved rights cases will end up, sooner or later, in negotiation, before or after judgment. I favor sooner rather than later.

I would also like to add a clarification to my comments: I do believe it is the Department of Interior who should initiate these negotiations within the Federal Government, but I think it is also the tribes' prerogative to take the initiative or to respond to State initiatives. In such cases tribes should be able to request the support and full involvement of the Federal Government through Interior.

Senator **BRADLEY**. In your experience with the Ute Mountain Utes, what was the precipitating factor for a settlement, and who precipitated it?

Mr. **GETCHES**. A later witness representing the Colorado Attorney General Duane Woodard, by the name of Lois Witte, will testify and will explain that process. It was initiated by the State through the Attorney General, supported by the Governor, and it was pursued with their enthusiastic efforts.

Senator **Bradley**. You have said that you think that part of the guidelines should be a commitment from the Federal Government financially that even is beyond what might come out of litigation. But you're operating in a real world there. Are you saying that before you determine the cost there should be a commitment? You're talking about the *Ute* case where there was a substantial commitment, and now there is, as you pointed out, very little funding coming forward to implement the settlement. Should we face up to those things before we enter into very costly settlements?

Mr. **Getches**. We certainly ought to, though the real world considerations mean that we can't always do it.

The desirability of doing it will become a necessity in the next few years if we see that Congress doesn't live up to that responsibility to continue funding these existing settlements.

Senator **Bradley**. Well, in a world where there are more settlements than can be funded, are you comfortable with Congress deciding which ones should be funded and which ones shouldn't? I took from your statement earlier that you were rather leery of Congressional intervention after settlements have been agreed except on the point of funding, where you thought there should be a kind of open-ended commitment—which is a very nice thing, unless you have to get the money.

Mr. **Getches**. First, I think that Congress should not intervene, as a general principle, unless there is some broad national interest or a problem with the trust responsibility in the agreement reached by the parties reach. Second, in making the financial commitment. I don't think that Congress or the administration should be constrained by the litigation exposure, because there are broader responsibilities.

Senator **Bradley**. But let's take a case where a lot of settlements make Federal commitments. You don't have the money to meet the commitments. Should Congress select which ones get it and which ones don't, or should we do a pro rata share across the board?

Mr. **Getches**. I wouldn't favor a pro rata share or a lottery. I guess I feel that there is, in the Federal treasury, sufficient money to deal with these problems. I think that the settlements that have been funded, to date, may look impressive at first blush, but they pale next to other, more impressive items in the Federal budget. I do think the nation can afford to live up to this responsibility to Indian people and their neighbors, even in times of tight budgets.

Senator **Bradley**. Is there any way that you could give us a ball park figure for what the total settlement costs would be?

Mr. **Getches**. I don't think anyone has done a calculus of that.

Senator **Bradley**. Pardon?

Mr. **Getches**. I don't think anyone has calculated that.

Senator **Bradley**. So we are basically dealing with your view that we should make good on settlement commitments from the Federal Government, whatever the dimensions, and at whatever time, in times of tough budgets?

Mr. **Getches**. Yes; and I think that Congress has done that in the past. For instance, when it authorized the Indian Claims Commission, over 300 claims came before the Indian Claims Commission. Congress had to consider funding each and every one. Congress did fund each and every one in the implementation of a Federal legal and moral responsibility.

Mr. WILKINSON. one thing in the funding that I suppose we all are getting at is that western streams or rivers are inherently flexible, even though they are "over- appropriated" and every drop is now being taken out. The way we have made them flexible in the past is we have tended to build dams and store the spring runoff and then release it during the summer when there is irrigation. That is expensive, it is environmentally destructive, and Congress has decided against that.

The settlements may tend sometimes to push in that direction, and one thing that this committee can do, as a matter of good policy—and so can the Department of Justice — is to push people toward the other alternatives to creating new water and rivers, which are: transfers, conservation buying from willing sellers, and, conceivably, condemnation of existing rights. Those are four ways. The fourth may be politically unacceptable; the first three can usually produce water at substantially less cost than a dam. I think you can be cutting back on cost by attempting to push negotiations towards those other three sources of new water.

Senator BRADLEY. What are the three again?

Mr. WILKINSON. Conservation, transfers, and purchases by the government of existing reclamation rights.

Senator BRADLEY. On the marketing question, do State laws restrict the transferability of tribal water rights?

Mr. WILKINSON. No.

Senator BRADLEY. They do not?

Mr. WILKINSON. Federal law does, though.

Senator BRADLEY. So that, in effect, they can't be transferred—

Mr. WILKINSON. They could be transferred—

Senator BRADLEY. —without change in Federal law.

Mr. WILKINSON. —with change in Federal law.

The way you've been doing it to date is by approval in individual acts. You could also pass a comprehensive bill that would allow tribes to make the transfers.

Senator BRADLEY. There is transferability of other Federal water rights.

Mr. GETCHES. That's a different issue. The transferability of other Federal reserved rights, as opposed to rights the Federal Government obtains through the appropriation system, would also be the subject of a separate determination by Congress.

I don't know of any authority that Congress has enacted allowing the transfer of Federal reserved rights, such as those attached to a military base or a national forest. Presumably, such an issue could come up. There could be a day when the Department of Interior or Department of Agriculture or Department of Defense proposes a sale or lease of water rights. For instance, if the Naval Oil Shale Reserve has water rights attached to it, and there is a private nearby oil shale development, the Navy may proposed to lease water rights to that private development, and Congress may see fit to approve it.

A closer case might be a situation where you have a military base close down and nearby irrigators want to lease the water rights from the Department of Defense. That's something that Congress would have to approve, and it might wish to do so in the interest of helping the local community.

Senator **Bradley**. Thank you very much, Mr. Chairman.

The **Chairman**. I think I would like to make an observation at this point. Last year, the Congress, together with the President of the United States, approved three settlements. The total cost of the Federal share of the settlements came up to $120 million. The budget calls for $30 million this year.

Unfortunately, under the present system, since these settlements "involve Indian rights," they have been made part of the budget of the Bureau of Indian Affairs, and the Bureau, called upon to make certain cuts, decided to take it out of their budget, the rationale being that if they included the $120 million, they would have to take away from other Indian programs.

Now, we have other claims and judgments in the United States. If I should be hit by an Army truck and the court says I am entitled to $10 million, I get paid $10 million. I think the Indians should be given the same treatment. We should have a special line item from which funds can be drawn.

If the Congress and the President should approve and they say that the judgment and our share of the cost should be such and such, like any other claim, I think it should be paid—not in 20 years, but when the availability of such funds would make some sense economically and socially. So this is what we are trying to do, and that is why we are having these hearings.

I thank you all very much. You have been exceedingly helpful.

Senator **Bradley**. Mr. Chairman, can I ask one more question?

Would any of you three be in favor of the establishment of an entity to facilitate negotiations of these settlements similar to the Federal Mediation and Conciliation Service? It would be specifically set aside to try to facilitate these negotiated settlements.

Mr. **Getches**. I haven't considered the issue before, but I'll respond briefly.

I am not opposed to the idea, but I see a concern with it. The concern is that one needs the assistance of the Department of Justice and the Department of Interior. One needs a cabinet level officer who can bring together the often disparate interests of the Federal departments, to resolve them internally, and to resolve the conflicts of interest that have always plagued the fulfillment of the trust relationship. Unless that could be done through such a proposal, I would be afraid of taking it out of the already admittedly imperfect mechanism that we have now. I would rather sharpen the abilities of Interior and Justice to deal with those issues.

Mr. **Willey**. On the surface, I see no problem in giving that kind of an option to the tribes if they want to choose to use such a service rather than the existing one.

Mr. **Wilkinson**. I last dealt with the service a great many years ago, and it is fuzzy. I just don't have a position on it.

Senator **Bradley**. Thank you again, Mr. Chairman.

The **Chairman**. Thank you.

I would like to thank you gentlemen very much. Although it took much longer than we had anticipated, this is such a complex matter that even the time we took is not sufficient. I hope we can continue these discussions.

Your suggestion that we should maybe draft a bill, if only for discussion purposes, has great merit.

Thank you.

Our next panel consists of: the Honorable John Washakie, Chairman of the Shoshone Tribe, Wind River Reservation of Wyoming; the Honorable Elliot Booth, Vice Chairman of the Colorado River Indian Tribes of Arizona, who will be accompanied by Mr. William G. Lavell, Tribal Attorney; the Honorable Marvin Osborne, Chairman of the Shoshone-Bannock Tribes of Fort Hall, Idaho; the Honorable Joe Ely, Chairman of the Pyramid Lake Paiute Tribe of Nixon, Nevada, who will be accompanied by Robert Pelcyger, Counsel to the Pyramid Lake Tribe.

Welcome. I will now call upon Chairman Washakie.

STATEMENT OF HON. JOHN WASHAKIE, CHAIRMAN, SHOSHONE TRIBE, WIND RIVER RESERVATION, FORT WASHAKIE, WY, ACCOMPANIED BY SUSAN WILLIAMS, LEGAL COUNSEL TO THE TRIBE

Mr. **WASHAKIE**. Thank you, Mr. Chairman.

Before we start, we have many tribes here today, but we also have some special people. We have our Indian students from across the nation that are participating in the close-up program.

The **CHAIRMAN**. Will all those students stand.

Mr. **WASHAKIE**. They've been in and out all day.

The **CHAIRMAN**. Are any of them left here?

[Recognizing those in the room.]

The **CHAIRMAN**. Welcome. There are two of them here. Where are you from?

Unidentified student. We are from Nevada, sir.

The **CHAIRMAN**. Welcome. I hope you are learning something here. We are trying to learn, too.

Chief Washakie, please go ahead.

Mr. **WASHAKIE**. My name is John Washakie, and I am the Chairman of the Shoshone Tribe of the Wind River Reservation in Wyoming. With me is the tribe's legal counsel, Susan Williams. We appreciate the opportunity to testify on Indian water rights, a matter of greatest importance to the tribes.

Let me go to the heart of the tribe's views on Indian water rights today. This hearing is most timely, as the tribe, on April 25, 2989, will be defending, in the U.S. Supreme Court, an award by the Wyoming Supreme Court of almost 500,000 acre feet per year of water to the Shoshone and Arapahoe Tribes, with an 1868 priority. It is based on the practicably irrigable acreage on the reservation.

The State's stated reasons for its attack on the award are representative, we believe, of concerns nationwide about Indians receiving the water which was reserved by and for them when their reservations were created.

We think the attack, however, is misguided, because the State is not in the forum which can offer the most satisfactory remedy for all concerned. Specifically, the non-Indians have sued the tribes, in our case, because they believe that if the tribes are awarded any water, non-Indians will be left with no water for the farms and other activities that they have labored long and hard to operate.

The tribes assert, however, that rather than trying to press in the courts novel and unworkable theories for reducing Indian water awards, the States and the tribes should be working diligently, calmly, and jointly to assess the nature and extent of any water shortages resulting from the Indians using their water awards.

Based on this information, strategically-placed new water storage can be designed and constructed to provide water to all persons on or near the reservation who can use water beneficially.

We fully appreciate that the enormously expensive water projects authorized in the past for non-Indians are no longer politically realistic. But we are firmly convinced that water supplies can be expanded significantly and efficiently without the same enormous expenditure of funds.

We also believe that Congress will continue its practice in recent history of funding Indian water rights settlements as part of any effort to minimize dislocation of current water users.

Congress must continue this support, as we believe negotiated settlements of these questions can be far more attractive than litigation.

With respect to using their water award, the Wind River Tribes have chosen the path of accommodation and reasonableness to try to avoid, to the maximum extent possible, injury to existing water users. The State—I must add, only after litigation—yielded to the tries a water award of significant size, and also has entered into discussion with the tribes to try to avoid injury to existing water users.

As a result, we have reached an historic interim agreement with the State that addresses not only water, but also tax matters that have created difficulty between the State and the tribes.

Next summer, in the event of a drought, the tribes have agreed to share any shortages with junior water users. In exchange, the tribes will receive a State tax abatement and cash needed to cover any crop losses that result from waiving an 1868 call next summer, and certain other compensation.

We are well into this effort, but are far from final resolution. To continue, we must have Congress 'assurance that it will: one, appropriate funds to expand water supplies on the reservations; and, two, confirm the parties 'authority to devote water to its highest and best uses.

These remedies are compelled by Congress 'apparently conflicting water commitments at the turn of this century, first to the Indian, and later to the non-Indian settlers, by the history of water development on our reservation, by the critical need for Indian water issues to be resolved by negotiation, and by powerful market forces in the west.

Let me explain each of these factors in turn.

Mr. Chairman, the Wind River Reservation is the second largest in the country. The resident Indian population is approximately 4,000 Arapahoes and 2,500 Shoshones. The Shoshone, and later the Arapahoes, both were settled on the Wind River Reservation. most residents are now involved in agriculture. The reservation was established in 1868, and early this century, the Federal Government announced plans to develop water supply and delivery systems on the reservation for the tribes' members.

Thereafter, the United States encouraged non-Indians to buy and to farm certain reservation tracts, even after the U.S. Supreme Court, in 1908, held that sufficient water was reserved for the Indians when the reservation was set aside.

Not surprisingly, the plans for Indian irrigation systems, as a consequence, never were realized fully. Instead, over the years the United States has emphasized water supply and delivery systems that benefit primarily the non- Indians. Today, the Bureau of Indian Affairs estimates almost $5.4 million is needed just to complete the Indian water delivery systems on the reservation, and another $22 million is estimated as needed to rehabilitate the existing systems.

Significantly, none of the Federal laws that entitled non-Indians to settle reservation lands abrogated the Indians 'earlier water rights. The Federal practice, however, has been not only to emphasize development that favors non-Indians, but also to manage irrigation projects so that non-Indians' fields were served first.

The tribes' senior water award for the first time now can help ensure that the Indians realize fully the benefits of the reservation which was set aside for them. But the water delivery systems needed to bring the water to its users finally must be completed, and any new construction of water storage that may be needed for other uses must be identified to minimize dislocation of current users.

Last summer illustrates the benefits of such efforts by the State and tribes, and our sincere efforts to respond sensibly to the complexities on the reservation.

The Crowheart irrigation project is one of three BIA-operated reservoirs, and one of six reservoirs on the reservation. Last summer, the Indian fields that have an 1868 award from the Wyoming Supreme Court were going dry, while the non-Indians' fields, with later priority dates, were soaked. The tribes stepped forward and indicated that, if necessary, they would call their senior rights so that the Indian fields would not be burned up.

The non-Indians panicked and litigation seemed inevitable. Instead, the tribes and the State's scientists and engineers sat down and worked out a management plan that was endorsed by the BIA and which resulted in water being made available to all fields. Of course, the tribe, with its senior rights, had no legal reason to do this. But the tribes are concerned that their reservation citizens not be harmed by essentially Federal oversights; thus, they devoted substantial resources toward avoiding that harm, and succeeded in doing so.

Although this immediate resolution may not be possible in every case, the Crowheart experience, we believe, is an important foundation for the positive discussions between the State and the tribes on Indian water matters that may arise in the future.

The Wind River Tribes face many thorny challenges as they put their water to use in order to create employment. The United States and non-Indians must appreciate these challenges and must help us work to solve them. The only alternative is to fight in court, where so many issues simply cannot effectively be addressed, such as monitoring, enforcement, and ensuring water is devoted to its highest and best use, while sound conservation principles are observed.

Let me highlight only the principal challenges ahead. First, as a result of the irrigation activities on our reservation, many valuable fisheries are destroyed or are near destruction. We had some of the most beautiful and abundant fishing in this country. That fishing provides a livelihood for many.

Water is not just an economic commodity, but it also makes possible certain cultural and religious activities important to many members of the Shoshone Tribe. Unfortunately, the Bureau of Reclamation has taken a dim view of fisheries protection on the reservation, particularly at Bull Lake, even though the BIA view is that the United States has a trust responsibility to protect fish and game on the reservation.

Reclamation is more concerned with meeting its water delivery contracts with non-Indians. The tribes believe joint efforts to design strategically-placed new storage can address any conflicts over water, as between agriculture and fisheries.

Another difficult task will be our effort to decide how best to use that portion of the water award that is not presently being used. We sense pressure from many Members of Congress to use that water only for agriculture on the reservation.

No other water user is so restricted, and this position simply is unfair. With our 70 percent unemployment rate, we must have the flexibility to devote that water to its highest and best use. Be assured no decision ever would be made in this respect that has the effect of wasting the reservation's water resources.

A third task is to assess the nature and extent of any water scarcity that may result from the Indians devoting the unused water to particular activities other than fisheries. Carefully placed and designed water storage again will be critical to alleviate any identified shortages.

Finally, the tribes increasingly have become aware of long ignored water quality problems on the reservation that will burden both Indians and non-Indians. The State lacks jurisdiction to address directly these problems on the reservation, and the U.S. Environmental Protection Agency appears to have done a woefully inadequate job of safeguarding the reservation's precious water supplies.

The tribes have created the Wind River Environmental Quality Commission to begin this summer the testing needed to obtain baseline data so that protection strategies can be formulated as soon as possible. State cooperation may well be helpful.

Mr. Chairman, in all of these ares that tribes, the United States, and the State could fight in court and never address all the important issues. The tribes, instead, call for the reasons, scientifically-based joint efforts. But, if the tribe's sovereign integrity and water and other property rights are not respected, we will be forced, once again, to defend them in court.

Let us all get on with development for the benefit of our regional economies, and let us work together to ensure that the precious resources we have today will be available for our children and our grandchildren tomorrow.

Thank you.

[Prepared statement of Mr. Washakie appears in appendix.]

The **Chairman**. Mr. Chairman, I wish to commend you and your tribe and the Arapahoes and the State of Wyoming, and Governor Sullivan, in particular, for developing and maintaining a very enlightened and mutually beneficial relationship. I hope that we, in the Congress, can be equally enlightened. I thank you for your testimony.

I now call upon Vice Chairman Elliot Booth of the Colorado River Indian Tribes.

STATEMENT OF HON. ELLIOTT BOOTH, VICE CHAIRMAN, COLORADO RIVER INDIAN TRIBES, PARKER, AZ, ACCOMPANIED BY LAWANDA LAFFOON, TRIBAL SECRETARY; MONA FERNANDEZ, TRIBAL TREASURER; AND WILLIAM LAVELL, TRIBAL ATTORNEY

Mr. **Booth**. Thank you, Mr. Chairman, for this opportunity to testify concerning Indian water policy. With me today are two tribal council officers who are accompanying me—Lawanda Laffoon, Secretary of the tribe, Mona Fernandez, Treasurer—and Mr. William Lavell, who is our tribal attorney.

We are particularly pleased to be here with you today. It is nice to see Senator John McCain again. I met Senator DeConcini last night, so we touched base with our Arizona delegation.

Let me start off with the history of our reservation. The Colorado River Indian reservation was established in 1865 by an act of Congress, and it was signed into law by President Abraham Lincoln. Since then, the land base has been increased by four Executive Orders. Now the total reservation consists of 268,691 acres, of which 225,995 are in Arizona and 42,696 acres are in California. The reservation straddles the Colorado River for approximately 45 miles.

We'd like to bring to your attention today three areas which we want to address, one being the irrigation project, water leasing, and a problem which we are having with the Department of Agriculture.

The first matter we want you to consider is that a reserved water right is of potential value only if it is not put to use, and potential value does not help us overcome our poverty and unemployment problems. Our unemployment rate now on our reservation is around 45 percent.

A brief review of the history of our reservation and its irrigation project will demonstrate this.

Prior to the establishment of the reservation, the Colorado River Valley was occupied between the area of Ehrenberg-Blythe on the south to Needles and Fort Mojave on the north, by Mohave Indians and some Chemehuevi bands. Our tribes lived by farming the lands along the Colorado River that were flooded in the spring. We also subsisted on hunting and fishing. So we hold in deep reverence the land and the water that we use and our forefathers used for their livelihood.

In years when there was sufficient flooding, the crops were good. In other years, there was famine.

In 1864, Charles Poston, then Superintendent of Indian Affairs for Arizona, recommended that a reservation be created at the present location of the Colorado River Indian Reservation in order to persuade the Mohave and Chemehuevi to occupy a smaller area because of encroachment on our lands by non-Indians.

He also recommended that the Federal Government fund the diversion and canal works necessary to provide irrigated farming for the Indians so that they could live on a smaller area of land. This promise by the Federal Government to provide irrigated farming was relied on by the Mohave and Chemehuevi Indians who moved onto the reservation; however, this promise by the government has never been fulfilled.

In 1867, the first appropriation—and I think it is the first approved Congressional appropriation—for the irrigation projects was made for the reservation. By 1900, only 500 acres were under irrigation; by 1940, 10,000 acres; and by 1958, 35,000 acres. Between 1867 and 1958, the total amount of lands that were to be subjugated to irrigation were variously estimated to be between 100,000 acres and 150,000 acres.

I was listening throughout this conference about the early Bureau of Reclamation era and the funds that were provided primarily for the non-Indian irrigation water users. Well, maybe somebody had foresight to keep Indians from progressing. I think it sure holds true today.

In 1963, the tribes were adjudicated rights to water sufficient to irrigate 107,588 acres of land. Unlike some of the tribes who are negotiating or trying to quantify their water through various settlements, we have ours already adjudicated.

Thereafter, since the Federal Government did not appropriate funds for irrigating the additional 72,500 acres, the tribe entered a series of long-term—25 year—development leases for the development of approximately 50,000 acres of land to irrigated farming.

In order to do this, the tribe had to lease at an average price of $22 per acre per year. The current market value of irrigated lands on the reservation is approximately $122 per acre, and it had been much higher before the recent drop in the agriculture economy. This brought the total irrigated acres to approximately 85,000 acres.

In 1987, the Bureau of Indian Affairs contracted to conduct a rehabilitation and betterment assessment for the Colorado River Indian Reservation's irrigation system. A first draft report was released in the fall of 1988, and the final draft is being completed at this time.

This report indicates that the extension of the existing irrigation system to serve an additional 22,500 acres, together with certain rehabilitation of the existing system, has a cost/benefit ratio of 1 to 6. The total cost of the project is estimated at $92.7 million.

I am wondering if, back in 1867 or so, Congress had fulfilled its promise to complete the irrigation system, how much that would have cost. It would have been a lot less than what it is now in 1989 dollars.

The tribe has already contributed the cost of developing the 50,000 acres developed under the development leases. We are now asking that the Congress fund the development of the additional 22,500 acres so that the irrigation project can be completed as promised. We have asked for an add-on of $2,455,000 for fiscal year 1990 to begin the engineering work necessary to finally complete our project—more than 120 years after its start. For all of those 120 years we have had problems of poverty and unemployment which were not helped by the potential value of our reserved water rights.

I want to touch on water marketing or leasing.

Proper development of our reservation requires that we have maximum flexibility in putting our water and other resources to the best beneficial use to achieve the purposes of the reservation. The primary purpose of the reservation was and is to provide a homeland for Indians settled on the reservation.

While the measure of our water right was based on the number of practicably irrigable acres, it is clear that the use of the water is not limited to the purpose of agriculture.

We have plans to continue the development of recreation resources along the river, to provide some additional light industry, and perhaps some mining operations on the reservation—all of which will use some amount of water.

In addition, we are considering such things as aquaculture for the raising of fish and other ventures.

In the past year we built a state-of-the-art cotton gin on the reservation in partnership arrangement with Anderson- Clayton Company. It began operations last November.

As can be seen from a review of the economic development efforts on Indian reservations throughout the United States in the past 25 years, there have been several problems standing in the way. One has been the legal impediments to obtaining financing necessary for any development. This has been largely overcome with substantial help from Congress in establishing programs such as loan guarantee and insurance.

Another constraint has been the availability of venture capital to proceed with development. Without venture capital, it has been necessary for Indian tribes—including this one—to bring in partners with the venture capital when willing partners can be found. This requires us to give up a large portion of ownership, profits, and control of any particular venture.

Cases in point on our reservation are the development leases mentioned above, and a lease which we signed several years ago for development of a gypsum mine and wallboard plant. In that lease, we were to receive only rents and royalties in the beginning years, with an option to purchase the business in increments during the course of the lease. We were forced to do this at that time because we did not have the capital to go out and borrow the money necessary to finance it ourselves. Since the original lessee did not perform, we are considering the possibility of building the plant and developing the mine site as a tribal venture and hiring management, through a management contract, to operate it. In order to finance this kind of venture, we need capital.

It is our plan to raise this capital by some limited water marketing. We have been reviewing this matter for several years at the tribal council level. Among the possibilities that we have explored has been the marketing of what is known as a dry-year option to the lessee. This would give the lessee, such as cities in central and southern Arizona, what they need—an assured supply of water in shortage years—and would give us what we need—capital at this time, to proceed with our developments. The same would be true of any marketing we would do in California, since we have adjudicated water rights in both States.

This brings us to the question: do we have authority to market water for off-reservation use? Attached, as Attachment A, is a copy of a paper delivered at the Third Annual Water Marketing Conference at the University of Denver College of Law on October 6, 1988, by our tribal attorney, Bill Lavell, which discusses the issues and possible solutions. For the purposes of this hearing, it is sufficient that we state the following:

One, We have adjudicated water rights and, therefore, should not be asked to accept artificial constraints on the use of our water as a condition to marketing authority. Tribes who are negotiating a settlement of their water rights may wish to make certain concessions in order to get a firm quantification of those rights. We have already taken our lumps in court, and should not be asked to make further concessions.

Two, we believe the United States has a trust responsibility to secure, protect, and develop the water rights of all Indian tribes, and particularly those who have adjudicated rights. This includes the right to all reasonable and beneficial uses of such water, including water marketing for off-reservation use.

While the basis for determination of an Indian reserved water right is different from a State appropriative right, the bundle of rights received is substantially the same—the right to put the water to any reasonable and beneficial use. We believe that the Federal courts have so defined this right. The only possible constraint on the exercise of this right is the Non-Intercourse Act—25 U.S. Code 177. It should be noted that this act was enacted as a shield to protect Indian property rights, not as a sword to cut them back.

In order to further the goal of self-determination, as set forth in the Indian Self-Determination Act, such a program of flexibility in the use of water and other resources is essential for tribes to become more self-sufficient as the Congress has asked us to do.

The third area we'd like to address is the current problems we are experiencing with the Department of Agriculture.

Unfortunately, in using our water for agriculture, we have run into some difficulties with the U.S. Department of Agriculture in the recent past. These difficulties are more fully set forth in the correspondence attached, but I will summarize them as follows:

One, in 1987, the tribe leased approximately 20,000 acres of off-reservation land and combined it with reservation land in the cotton program in order to put an additional 7,000 acres of reservation lands in cotton farming for the year.

The Department of Agriculture ruled that this did not constitute a farming unit, and we appealed that ruling and won, and we surely thank the members of your committee and members of the Arizona Congressional delegation in supporting us.

Thereafter, the Department of Agriculture changed its regulations so that the exemption from payment limitations applying generally to Indian lands were limited to Indian lands located on the reservation, and lands leased by the tribe off reservation were specifically excluded from the operation of the Indian exemption as set forth in 7 CFR 1497.22. This problem is more fully set forth in the correspondence attached as attachment B.

Two, on March 24, 1989, we received a phone call from the State program specialist of ASCS who advised us that, since one of our 130 lessees was not in compliance in the partnership operation of its farm, the entire $1.8 million cotton subsidy payment which the tribe would get under three separate farming operations conducted by the tribe on approximately 16,000 acres of reservation land would not be paid Instead, we would be entitled to only one $50,000 payment.

This news was given to us right in the middle of the planting season. We were faced with either going ahead and continuing our planting under the program and risk losing practically all the profit for this year, or changing our planting program in the middle of the season.

Fortunately, we were able to change some of the planting from short staple cotton in the program to long staple cotton out of the program, and thereby reduce the risk involved. But the problem still remains, not only for us, but for every Indian reservation that both farms some of its own land and leases other land out.

This is another attempt by the Department of Agriculture to negate the Indian exception to payment limitations. This exemption was established to encourage agriculture on Indian reservations and help Indian tribes to become self-sufficient. It should be noted that a similar exemption applies to State school lands. Obviously, this ruling imposes business risks that neither the tribe, nor any other farmer, can live with.

We have sent a request for an opinion on this issue to the Department of Agriculture through the Interior Department pursuant to the Agreement in Principle between the two departments dated January 20, 1988, a copy of which is attached. We are in hopes that we will get a favorable response from the Department of Agriculture when they sit down with the Interior Department and work out this matter pursuant to the Agreement in Principle. If not, we can assure you that we will be coming to Congress for correction of what we consider an unlawful attempt to negate the Indian exception contained in the present regulations. Correspondence regarding this issue is attached as attachment C.

In conclusion, I want to refer to an excerpt from the "Handbook of Federal Indian Law," which clearly sets forth the responsibility of the United States in regard to Indian water rights and its failure to adequately discharge that responsibility. The following quote summarizes the points:

"The United States, in its role as guardian of Indian lands, is charged with the responsibility of administering trust property for the sole use and benefit of its Indian wards.

"In the history of the U.S. Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservation it set aside for them is one of the sorrier chapters.

"The legal right to water does not automatically bring with it the capital investment necessary to realize its economic benefits. Irrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indian. Consequently, most Indian tribes have not been able to utilize their full entitlement of water."

In order that the United States might better administer the trust property of Indians and Indian tribes, we suggest the following:

One, complete irrigation projects on all Indian trust lands, as their water rights allow, as the top priority before development of any other water projects. Since we have been waiting for completion of our project for more than 120 years, longer by far than any other project, Indian or non-Indian, we do not believe it unreasonable to ask that we be given first priority.

Two, allow maximum flexibility to Indian tribes in developing their trust property, including the right to market water for off-reservation use. This right should not be encumbered by any restraints other than restraints contained in the general leasing law which are designed to protect the trust property involved and the interests of Indians and Indian tribes therein.

Three, make certain that all departments of the government understand and act on the duties imposed by the responsibility of the United States in administering the trust property of Indians and Indian tribes. This will require continuous oversight and corrective legislation where necessary.

Thank you, again, for this opportunity to present our testimony. We will be happy to answer any questions you may have.

[Prepared statement of Mr. Booth appears in appendix.]

The CHAIRMAN. Thank you very much, Vice Chairman Booth.

Senator McCain, do you have any questions?

Senator McCAIN. Thank you, Mr. Chairman.

Thank you, Mr. Booth, for your important testimony. I have had the opportunity of visiting you on several occasions, and am very supportive and, in fact, praise the economic efforts that have been made by you and the other members of the council and tribe in economic development for your tribe. And, of course, I have great respect for your counsel, Mr. Lavell, who does such a fine job.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

May I now call upon Chairman Osborne?

STATEMENT OF HON. MARVIN OSBORNE, CHAIRMAN, SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, FORT HALL, ID

Mr. OSBORNE. Thank you, Mr. Chairman and members of the committee.

I am Marvin Osborne, Chairman of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho. I want to mention that we appreciate the opportunity to be here before you today.

On a footnote I think it is very important to indicate that the Fort Hall Indian Reservation, with the creation of the 1868 Fort Bridget Treaty, has clearly defined the Fort Hall Reservation as the permanent homeland for the Shoshone and Bannock Indian people.

Accordingly, in the time alloted, our oral testimony— and in our written submission for the record—I will try to focus on some of the aspects of the general impressions derived from the continuing relationships of the United States and our water rights.

First, while Congress has often expressed its strong and continuing commitment to fulfill the promises made to the tribes in treaties, Indian interest have been subjected to and suffered from a lack of clarity and follow-through on the part of the Legislative Branch in numerous respects.

Clarification of the Congressional and Executive trust responsibilities is imperative, especially since the Supreme Court recently agreed to review State challenges to the longstanding Winters Doctrine announced in 1908, and its quantification for Indian water rights reserved for agricultural purposes based upon all practically irrigable acreage within Indian reservations.

Western States are, at this very moment, in the nation's highest court, advancing the wholly untenable position that Indian tribes are entitled, under Federal law, to only that amount of water necessary to fulfil their minimal needs.

First of all, it is critical for Congress to provide sufficient funding to enable affected Indian tribes, assisted by the United States, to properly assert their water claims and effectively defend their Federally reserved water rights.

The Shoshone-Bannock Tribes, the State of Idaho, the United States, and a coalition of Idaho water users, have been engaged in good-faith, government-to-government negotiations since 1985 to determine the nature and the extent of the tribe's reserved water rights in the Snake River Basin in Idaho.

So these unparalleled and historic negotiations are occurring within the context of a State court adjudication. A settlement of the tribes 'claims to reserved water rights on or near the reservation appears imminent; however, in light of the experience of other tribes in the States which lead to successful resolutions of water conflicts, all parties to the negotiations are gravely concerned that Congress may not provide the Federal resources essential to implementing such an unprecedented agreement as is contemplated for the Snake River.

The negotiations have also clearly indicated that Congressional clarification is necessary with respect to off- reservation marketing of our reserved water rights. As we shall detail in further written submission to the Select Committee, transfers involving reserved Indian water rights are essential to resolving Western water conflicts, as well as improving the operation, flexibility, and performance of malfunctioning, outdated water allocation systems across the West.

Most incredibly, our State adversaries seriously purport to contend in the high court that Indian signatories to the treaties, in exchange for surrender of the right to occupy millions of acres of pristine land—and the way of life they had enjoyed since time immemorial—received in return nothing more than an opportunity to achieve the barest minimum standard of living.

What we feel must be done is that, first, Congress must adequately fund and effectively provide for tribal participation in negotiations and/or litigation designed to quantify their vested water rights.

Second, Congress must provide necessary funding to implement such water rights once they are negotiated or, if necessary, settled through litigation.

Third, Congress must provide both the Executive Branch and the Judicial Branch of the Federal Government with an unequivocal declaration of intent that Indian reserved water rights are to be honored.

We understand that the Select Committee, in January of this year, heard testimony from Louis Clairborne, a former senior attorney in the Solicitor General's Office of the Department of Justice. Mr. Clairborne, who prepared and argued numerous Indian law cases before the Supreme Court over a period of two decades, expressed deep concerns and despair over the absence of a principled commitment by Executive agencies to effective advocacy and vindication of tribal rights.

He and other witnesses especially identified the recent position taken by the Solicitor's Office of the Department of the Interior, essentially characterizing such positions as, at best, haphazard, inconsistent, and unnecessarily defeatist, and, at the words, openly hostile to Indian interests.

Finally, we cannot overstate that once Congress appropriates funds to assist tribal governments in protecting their water rights, it is absolutely essential that the Executive Branch agencies not be accorded unchanneled discretion to withhold the human and financial resources necessary for the realization of tribal self-determination.

For example, Federal agencies 'thwarting the intent of Congress can be seen in the implementation of the EPA of the 1986 amendments of the Safe Drinking Water Act. Those amendments authorized EPA to treat Federally recognized Indian tribes as States; that is, as having primary responsibilities for regulation of public water systems and underground injection control programs within the tribes' jurisdiction.

EPA has set up a series of regulatory hurdles through which tribes must go in order to certify, by EPA, for primary enforcement responsibilities. Rather than facilitating and assisting achievement of tribal primacy, as Congress intended, EPA has adopted a heavy-handed approach which will prevent all but a handful of Indian tribes from every achieving primacy on equal footing with the States.

Moreover, EPA's pathetic allocation of funds to support tribal efforts to obtain certification and to institute tribal regulatory programs is appalling.

As an example of the hurdles of EPA's regulations to achieve Federal certification, tribes must provide detailed assessments of political feasibility of assuming primary responsibility, carefully document all tribal jurisdiction claims and substantiate them with legal brief, making a compelling argument in support of tribal jurisdiction, and provide EPA with convincing evidence of the tribe's administrative capabilities. And then EPA has failed to provide funding the tribes to implement this burdensome process.

We want to identify the EPA problems as an example of Congress to be aware as it formulates Federal Indian policy. It is not enough for Congress to establish policy, there must be a clear implementation direction to the Federal agencies.

As our Chief Tyhee said over 100 years ago in negotiations, "What we do must be for the rising generation."

Mr. Chairman, in establishing Federal Indian water policy, we know that you will be mindful of the welfare of all of our children, and of all the children yet unborn.

Thank you.

[Prepared statement of Mr. Osborne appears in appendix.]

Senator McCain. Thank you very much.

Mr. Ely, welcome.

STATEMENT OF HON. JOE ELY, CHAIRMAN, PYRAMID LAKE PAIUTE TRIBE, NIXON, NV, ACCOMPANIED BY ROBERT PELCYGER, COUNSEL TO PYRAMID LAKE TRIBE

Mr. Ely. Thank you, Mr. Chairman.

Mr. Chairman, distinguished members of the committee, Senator Bradley, I am honored to testify before you today on a matter of grave importance to my tribe—water.

My name is Joe Ely. I am the tribal chairman for the Pyramid Lake Paiute Tribe. Our reservation is located 36 miles northeast of Reno, Nevada, and is 475,000 acres in size. Pyramid Lake is 115,000 acres in size located totally within the boundaries of the reservation. Pyramid Lake receives its water from Lake Tahoe, 100 miles to the southwest, via the Truckee River, which flows through the city of Reno and on to Pyramid Lake. Pyramid Lake is a terminal body of water with no outlet, and with only the Truckee River as its supply of inflow.

The tribe derives most of its livelihood from the Lahontan Cutthroat Trout fishery by selling use permits for fishing, boating, and camping. Many of the families residing on the reservation are employed by the fisheries, with the balance employed in the tribal administration, private enterprise, cattle operations, and off-reservation employment in nearby Reno. We have a total membership of about 1,800 people, of which about 1,500 reside on our reservation.

To understand the cultural significance of water to our people, and specifically the importance of the Truckee River water, you have to go back to our origins.

The Legend of the Stone Mother tells of the origin of our people. It tells of settlement of the tribe, cui-ui tuccatta—which means cui-ui eaters—it tells of the Lake's origins, Cui-ui pah—which is Cui-ui lake—and the origin of its fish, the Cui-ui. It tells us that all this creation was simultaneous; that the son of the Stone Mother became our ancestor, that the tears of the Stone Mother became our lake, that the lake's shore became our home, and its depths the home of the cui-ui fish.

This legend sets our identify and forever fixes the components that make up our way of life. When we talk of the water, it must be understood that it is a major component of our identify and way of life. These components are: the cui-ui tuccatta, which is the people; Cui-ui pah, which is the lake; and the cui-ui, which is the fish. These are inseparable components, and one does not exist without the other.

I know one might make light of this significance or write it off as romance, but to us it is everything. And as we watched the scramble and the money flow to celebrate the Statue of Liberty, which we consider of lesser significance, we know that your culture also holds important its own identifies and rituals.

After the lake's origin, and since time immemorial, the tribe has lived near its shores and has drawn its sustenance from its abundant supply. We were a prosperous people, our main sustenance being the cui-ui fish found only at Pyramid Lake, and, to a lessor degree, from the large Lahontan Cutthroat trout which also inhabited the lake.

Most of our lives were spent gathering food and partaking in various festivals and ceremonies associated with these gatherings. There were rabbit drives, deer hunts, pine-nut gatherings, mudhen and duck harvests at adjoining Winnemucca Lake, trout fishing, and many other forms of harvesting ventures—but none like the annual harvesting of the cui-ui.

The cui-ui would run in mid-spring, which would allow for about a 2- or 3-week harvest. The remainder of the year the Cui-ui would stay in the lake's depths and would be unavailable for catch. As the run developed, word was spread and the tribe, made up of scattered bands, would come together to renew old friendships and aid in the long, but happy, work of the harvest.

Excitement and festivity would fill the air as many cui-ui were caught, dried, and stored for the coming year. The fish were abundant and could be caught by hand. Stories are told of the water turning black with the fish, and of small children climbing on the many backs of the fish as they moved into the shallows on their journey up river to the their spawning grounds.

This was a time like no other, and the animation and excitement in the eyes of the elders as they tell these stories only give us a glimpse of its excitement. This way of life continued for many, many generations, but, as the twentieth century started, it all came to an abrupt end.

In 1902, during the Roosevelt administration and under the infant Bureau of Reclamation, Congress authorized the Bureau's first reclamation project. The plan was to direct water from the Truckee River upstream of Pyramid Lake to what was then a large desert basin and turn the sand into green fields and farmland. This project is known as the Newlands project, which has proven to be a failure as an agriculture project, has dealt a tremendous blow to the tribe, and is currently spelling death to any and all wildlife associated with its operation.

To accomplish the project, in 1905 Derby Dam was completed and the water was diverted to the project. Within the next 40 years, the elevation of Pyramid Lake dropped 70 feet, creating an impassible delta and barrier between the lake and river. The Lahontan Cutthroat trout became extinct in Pyramid Lake, and the Cui-ui numbers shrunk to a point where harvest was impossible.

Pyramid's sister lake, Lake Winnemucca, dried completely, taking with it its wildlife and wetlands habitat. It appeared our way of life and existence as a people were nearing an end.

In 1944, the Federal Government dealt what should have been the coup de grace to the tribe when the Bureau of Indian Affairs negotiated on our behalf the Orr Ditch Decree. The decree was to put down in writing the various water allocations on the Truckee River.

It was BIA's task to use the Winters Doctrine to protect our water and preserve our purpose as a people. But early on in the forming of the decree, BIA made a terrible error, an error that would set the tone for many years of litigation and hardship for our tribe.

BIA determined that it was the purpose of our tribe that we should be farmers, and even though we continued to explain our status as fishermen, BIA went in to negotiate our rights only as farmers, and not as fishermen.

The results was: after the final gavel fell and the Orr Ditch Decree was set, the tribe was to receive a water right of 31,000 acre feet total from the truckee River to be used only for agriculture irrigation purposes.

Pyramid Lake and the fisheries were given no right of any kind, and would only receive what was left over after the Newlands project and all other water rights were taken.

From receiving 450,000 acre fee of water annually—it takes at least 400,000 acre feet annually just to replace evaporation losses and maintain the lake level—into Pyramid Lake before the turn of the century, to ending up with a right to only 31,000 acre feet for agriculture irrigation and zero right for fisheries after the Orr Ditch Decree, our tribe's ability to maintain its livelihood and way of life became a near impossibility.

Much of what has happened since then is well documented. Our tribe has engaged in litigation for many decades to reclaim water necessary to restore our fisheries. We suffered some losses and won some victories, but one thing I can tell you is that through the blessings of God and the tenacity of our people, we're still here.

Our people and our resource, although crippled and many times down, are surviving and recovering. The Lahontan Cutthroat Trout have been re-introduced into Pyramid Lake, and, thanks to the continued financial support of Congress, we have managed to build hatcheries ranked in the best of the nation and have turned the trout fishery into a success that ranks within the top three trophy fishing lakes in the United States holding the world's record with a 41-pound trout caught in 1925.

The Lahontan Cutthroat trout is still listed as threatened on the endangered species list, primarily because of their reliance on an artificial hatchery spawn, but their recovery is steady and its is our hope a complete recovery, including a natural spawn in the river, will occur in the future. Their success will spell economic recovery for our tribe.

The cui-ui are another story. Although they have survived, they are doing very poorly and do not reproduce well in a hatchery environment. The cui-ui are not only an endangered species, but are also an endangered genus found only in Pyramid Lake. They still stand on the brink of extinction, and if it wasn't for a couple of flood years in our recent past, they would have been gone forever.

There is only one solution to the cui-ui's problem, water — water of sufficient quantity to allow the fish over the lake's delta and into the river to spawn, and of sufficient quality to provide habitat for that spawn.

The tribe has been, in the recent years, a party in an effort to achieve an overall settlement of the water problems in the Truckee River system. And, due in large part to the efforts of Senator Reid, this settlement is going well and you should be receiving a bill in the next couple of months. The primary parties involved will be the Pyramid Lake Paiute Tribe, the Federal Government, the States of Nevada and California, and Westpac Utilities, the water purveyor for the cities of Reno and Sparks, Nevada.

We hope to take care of many of the water problems plaguing the area, as well as going a long ways in insuring the water necessary for our fisheries recovery. Unfortunately, the Newlands Project will not be a party to this agreement, and it is the Newlands Project that remains the poison on the system.

It is easy to guess their reasons for not negotiating. Their sweetest deal was cut back in 1902 when the project started, and in 1944 under the Orr Ditch Decree.

As long as the Federal Government chooses to ignore the problem and the project, it will remain steadfast in its no negotiation posture.

For the sake of simplicity, let's tally up the score of destruction the Newlands Project has executed. Since 1905, it has completely destroyed the natural Lahontan Cutthroat trout fishery at Pyramid Lake, which consequently completely destroyed the tribe's economy,, leading to reliance on Federal funds. It has all but led to the extinction of the cui-ui, which is the identity and major component of the tribe's way of life. It has dried up totally our sister Lake Winnemucca, which was a thriving wetlands and waterfowl area. It has caused major destruction of the Stillwater Wildlife Refuge near Fallon, Nevada, where the project spills its toxic poison into the wetlands after irrigating its fields. And it is currently destroying the world's largest natural pelican refuge, Anaho Island, by contaminating the pelicans 'food supply at the Stillwater Wetlands.

The sad part of all this is that there is a solution, and the destruction from this project could be stopped if only the Federal Government would recognize its mistake and take action to solve the problem.

It is our hope that in the near future we will regain the water we need to restore our fisheries, restore our economy, restore our traditions, and regain our strength as a people.

Our water, fisheries, and people are our livelihood and our way of life. We will struggle to recover and maintain what is ours, and, in the many generations to come on this earth, you can be guaranteed one thing: we'll still be here.

Thank you.

[Prepared statement of Mr. Ely appears in appendix.]

The CHAIRMAN. Thank you very much, Chairman Ely.

It may interest you to know that Senator Reid has submitted an application to serve as a member of the select committee, and, as chairman, I have submitted an endorsement of that application to the leadership. As chairman of the steering committee, a committee that has jurisdiction over committee assignments, you can be assured that everything will be done to see that your Senator sits on this committee.

Mr. ELY. Thank you very much.

The CHAIRMAN. We will call upon Senator McCain to add someone to the Republican membership of the committee, as well.

Senator MCCAIN. Thank you, Mr. Chairman.

I thank all of you for being here. I would like to ask one question.

The CHAIRMAN. Please do.

Senator MCCAIN. Mr. Booth or Mr. Lavell, if tribal reserved water is used off reservation by non-Indians, what law would govern this activity?

Mr. LAVELL. Senator, I would suggest that that should be handled by an inter-governmental agreement between the tribes and the State. In other words, we are going to go out soon, if the tribal council makes this decision, and negotiate some contracts—probably some in Arizona and possibly some in California.

In the process, we will very likely turn to the State, or the State will become a part of that process. A part of the negotiating process will be that we make accommodations on both sides to how that is going to be handled. So I would suggest that, rather than have Congress impose "This will become a State water right," as was done in the Ute settlement bill, that the opportunity be given to the States and the tribes to work out some agreement on the subject.

Senator MCCAIN. Thank you. Mr. Booth, we're working on that USDA payment limitation problem, and we hope we will have some results for you fairly soon.

Thank you, Mr. Chairman.

Thank you all for being here.

The CHAIRMAN. I would like to assure all of you that we are not only concerned, but we are going to try to do something about this.

The stories that you have told us this afternoon are another American tragedy and nightmare, and I will instruct the committee staff to begin drafting legislation and begin discussions with other members of the committee on what to do about this. So I will be calling upon you in a few weeks to help us come up with this legislation.

It is an area that is fraught with problems, but we are not afraid to tackle it, I can assure you.

Thank you very much.

And now it is my pleasure and great honor to call upon the governor of the sovereign State of Wyoming, the Honorable Michael Sullivan.

Governor Sullivan is here to represent the Western Governors Association.

Governor, I hope you will accept my apologies for keeping you here this long. I thank you for the patience you have shown.

As I told Mr. Washakie, I would like to commend your State and your leadership in bringing about this very enlightened and mutually beneficial relationship with the Shoshones.

STATEMENT OF HON. MICHAEL SULLIVAN, GOVERNOR, WYOMING, REPRESENTING THE WESTERN GOVERNORS ASSOCIATION, ACCOMPANIED BY PETER MAXFIELD, STATE PLANNING COORDINATOR

Governor Sullivan. Thank you very much, Mr. Chairman. Let me say that it is a privilege to appear before you and Senator McCain. I have enjoyed the delay and found it instructive, so no apologies are needed.

Mr. Chairman, my name is Mike Sullivan. As you are aware, I am the governor of Wyoming. I am a member of the Western Governors Association, and represent that association as lead governor for the ad hoc group on reserved Indian water rights. As I said, it is a privilege to appear before you.

I would like to introduce my state planning coordinator, Mr. Peter Maxfield, former dean of the University of Wyoming Law School, who was instrumental in the negotiation of the agreement to which you referred and to whom I owe much thanks for that purpose.

Other members of the ad hoc group include representatives from the National Congress of American Indians, the Council of Energy Resource Tribes, the Native American Rights Fund, and the Western Regional Council, which is a group of industries throughout the western region interested in the economies and the concerns associated with our area.

The ad hoc group—with which I have been associated since my election, and having assumed the Chair of the governor of Wyoming in 1987—has met since 1982 to review and advance negotiated settlements of Indian water rights disputes, and to identify and resolve barriers which impede such settlements.

When I became governor of Wyoming in 1987, one of the things I inherited was a 10-year-old lawsuit affecting all water rights within Wyoming's Big Horn River basin, to which you hear Chairman Washakie refer earlier. That reservation is a 21,000 square mile area containing the Wind River Indian Reservation.

The lawsuit has been both costly and time-consuming. Wyoming has spent nearly $14 million on the suit. We have been before a Special Master, before two district court judges, the Wyoming Supreme Court, and we are now before the U.S. Supreme Court.

While we have recently concluded, as you are aware, a temporary, 1-year agreement with the Shoshone and Arapahoe Tribes covering both mineral tax and water areas, the State's attorneys have taken the water litigation to the U.S. Supreme Court.

Given what we believe to be confusing and inconsistent standards in this area, it is our view that Wyoming cannot simply abandon its interest in obtaining a definitive ruling on the appropriate quantification standard for tribal reserved water rights.

Without intending in any way to criticize my predecessors, I must say that our experience would appear to confirm the view of many that litigation does not fully nor quickly resolve problems faced by the tribes, the State, nor affected private water users. Given my experience, I believe that negotiated settlements are the preferred way to go; however, there are some significant barriers to negotiated settlements which must be addressed and resolved, and you have heard some discussion about that already today.

The ad hoc group has spent 7 years attempting to identify and overcome these barriers to negotiated settlements. this past year, the group joined with the Western Senate Coalition to co-sponsor two workshops here in Washington on Indian water rights. The workshops offered an opportunity to get all of the various interests together to discuss the general principals and issues raised by settlements, and to later review the experiences from the three settlement bills which recently passed Congress.

I welcome this opportunity to provide you with what I have learned from these efforts. For the record, I have submitted the WGA policy resolution on Indian water rights, and the reports from the two workshops which we held in the ad hoc group for elaboration and for the information of the committee, as well as a copy of our tribal/State interim agreement and a copy of an Executive Order which I just recently executed reflecting what I believe to have been a policy of the State government since I assumed the position of governor, and that is, on a negotiation basis, a government- to-government relationship between the tribes and the State of Wyoming, and recognizing the sovereignty of those governments.

Let me elaborate just briefly on those things that we think, in the ad hoc group, that we have, in fact, learned from the discussions we have had.

First, Indian reserved water right disputes must be acknowledged as a national responsibility. They result from historic, and often conflicting, Federal policies which were formulated an enacted by a series of administrations and Congresses, and you certainly have heard ample evidence of that here this afternoon.

Fulfillment of treaties and trust responsibilities is a unique Federal obligation.

Equally important, the Federal Government must recognize that Federal laws and policies encouraged settlement and water development by non-Indians. There is a clear national responsibility to account for the obligations to tribal members, as well as to non-Indian who have invested in our western economies based on water rights, which are real property rights.

Secondly, negotiated settlements cannot be advanced without more certainty and continuity in the "rules of the game." Federal agencies should provide dependable, continuous, and competent assistance to the tribes. This assistance should include technical, legal, and financial assistance. It should also include a structure where one agency or one official is designated to speak for and with the authority to commit on behalf of the Federal Government.

As you know, many agencies have interests, and that has been discussed as well here today, and sometimes they are conflicting.

Third, a sustained, good-faith commitment to both negotiating and implementing settlements is needed to finally resolve these disputes. This will usually require reliable funding. I say usually, but I think probably almost always require reliable funding.

States, tribes, and local governments are increasingly recognizing and agreeing to fair cost-sharing provisions. However, often the Federal Government bears the obligation for the largest share of financing. We believe a separate line item budget category is needed for the lengthy period required to resolve the many disputes that exist.

Fourth, many settlements to date have contained some kind of water leasing or water marketing provisions. The ad hoc group recognizes the controversial nature of these provisions due to the State law, compact restrictions, and the uncertain nature of Indian water rights. I must say that there are differing views among members. The group is willing to work with others in reducing concerns caused by these provisions.

Finally, I would like to raise a concern which I have, and that is that I believe that the role of the States in these disputes must be emphasized and strengthened. States will want to be sure both that the dispute is resolved satisfactorily, and that the established economies are protected and preserved.

I would like to see the administration formalize a settlement negotiation process, to the extent that can be done, recognizing the unique nature of each settlement negotiation, but a process which reflects a strong role for the States.

We have, I think, in our interim agreement with the Arapahoes and the Shoshones, reflected the responsibility of the State of Wyoming. We have, in fact, put our money up. We have done that out of both self interest and because of the cooperation that we have been able to secure from the tribes. I commend the tribes for that cooperation.

We need the help of the Federal Government. We need a process that we can look to with commitment and understanding.

Thank you for this opportunity to testify. I would be happy to respond to any questions that you may have, Mr. Chairman.

[The prepared statement of Mr. Sullivan follows:]

The CHAIRMAN. Governor, I thank you for your statement. It is a wise statement—one that I hope members of the Western Governors Association can subscribe to.

With your permission, I will be instructing my staff to call upon your staff to assist us in drafting appropriate legislation to carry out some of the suggestions that have been made by all of the witnesses today, if that is okay with you.

Governor Sullivan. We would be pleased to participate and cooperate in any way, Mr. Chairman.

The CHAIRMAN. You mentioned your Executive order dated April 5, 1989. With your permission, I am going to read this, because these are not everyday occurrences, and I think members of Indian country who are assembled here should know what the State of Wyoming has done.

This is Executive Order 1989-4:

> Whereas it is the intent of the Governor of the State of Wyoming to recognize and respect sovereignty of the Shoshone and Arapaho Tribes;
>
> Whereas tribal governments are more aware of the needs and desires of their members than is the State government. Tribal governments should, therefore, have the primary responsibility for meeting those needs while being responsive and accountable to their members;
>
> Whereas State and tribal governments should work cooperatively in a manner which strengthens the concept of tribal self-government. Such cooperation is enhanced by a policy which affirms dealing with the tribes on a government- to-government basis;
>
> Now, therefore, I, Mike Sullivan, Governor of the State of Wyoming, by virtue of the powers and authority vested in me by the Constitution and laws of the State of

Wyoming do hereby proclaim that the State of Wyoming and its officials and agencies hereby accept the fundamental principle and integrity of the government-to-government relationship between the State and the Shoshone and Arapaho Tribes, and that this principle shall be the basis of the State's Indian Tribal Governmental Policy.

Given under my hand and the Executive Seal of the State of Wyoming this fifth day of April, 1989, Mike Sullivan, Governor.

Congratulations, sir.

Governor Sullivan. Thank you very much, Mr. Chairman.

The Chairman. I look forward to a time in the near future when members of your association will follow suit and take your leadership in coming forth with similar Executive orders.

I have no questions, other than to say that your recommendations are consistent with most of ours here, and we will do our utmost to come forth with legislation to implement the programs that you suggested. And, in so doing, we will be calling upon your staff to assist us in this venture.

Governor Sullivan. Thank you very much, Mr. Chairman. Let me say personally, and on behalf of the Western Governors Association, we are indebted to you, Senator McCain, and the members of your committee for the interest you are showing in these extremely important issues to our western States. We appreciate your taking the time to conduct these hearings, and your patience and perseverance in doing so.

Thank you very much.

The Chairman. Thank you very much, Governor.

Our final panel this afternoon consists of: Mr. William Horn, Attorney and Former Deputy Undersecretary for the Department of the Interior; Mr. Michael J. Clinton, Former Special Assistant to the Former Undersecretary of the Department of the Interior, Ms. Ann Dore McLaughlin, and Vice President of Bookman-Edmonston Engineering Company of Washington, DC; and the Honorable Lois G. Witte, Deputy Attorney General, Natural Resources Division, Office of the Attorney General of the State of Colorado, representing the Conference of Western Attorneys General.

I call upon Mr. Horn.

STATEMENT OF WILLIAM HORN, ATTORNEY AND FORMER DEPUTY UNDER SECRETARY FOR THE DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. Horn. Thank you, Mr. Chairman.

Mr. Chairman, thank you for the invitation to testify today. It is indeed a privilege to appear and discuss this vital issue of water settlements.

Although I am presently an attorney in private practice, from 1981 through 1985 I had the pleasure to have served as the deputy undersecretary of the Department of the Interior and was the department's chief negotiator on Indian water and fishery settlements during that time.

From that experience and the discussion today, it is clear that the active pursuit of comprehensive, equitable water settlements remains a very worthy goal. Frankly, it would be a travesty for the Federal Government to ignore or fail to seize the opportunities attendant to the pursuit of negotiated water settlements.

Pursuant to the committees request, my prepared statement describes at some length the policy of negotiated settlements and the manner in which that policy was implemented during my tenure at the department.

For the sake of brevity, I would like to skip that. It is in the record.

The CHAIRMAN. It will be made part of the record, I can assure you.

Mr. HORN. Thank you, sir.

I will offer my observations and recommendations regarding organization and process that I think ought to be employed by the new administration. These concepts arise from my participation in three successful water settlements—Ak- Chin, Fort Peck, and Papago—and two fishery settlements involving the Great Lakes and the Pacific Northwest.

I am persuaded that there are four essential elements in the pursuit of a successful settlement negotiation policy by the Executive Branch. First, the administration must be a player and should be actively involved from the commencement of any discussions. If the administration cannot provide leadership, it should, at the very least, be in a position to indicate, from the outset of discussions, what it finds totally unacceptable so that the parties commence the negotiations with some understanding of what can fly and what cannot.

Second, the administration must be in a position to make decisions and commitments. It cannot facilitate these absolutely necessary settlements without exercising leadership, and it cannot lead without being prepared to make the appropriate commitment of resources.

Success is contingent on any administration's ability to, in the vernacular, get its act together and forge a policy from among the disparate interests, be they at the Interior Department, the Justice Department, or the Office of Management and Budget. If it can't forge them together to speak consistently, it is very difficult for the non-Federal interests to respond in any meaningful fashion.

Third, the department's negotiators must be policy-level personnel and given sufficient authority to deal. To borrow a phrase from James Bond, the negotiators must have their "00" number when they go to the bargaining table.

One of the reasons that I found for putting policy-level people in charge of the process is that it is often difficult to provide nonpolicy career personnel the requisite type of authority needed to make the necessary commitments at the bargaining table. And if, indeed, those individuals—career personnel—can be gotten the authority, it can be often difficult for them to participate subsequently, directly, and effectively in the decisionmaking process within either a department or within an administration to defend the decisions they made at the table.

In my experience, this internal process is crucial to achieving an authoritative negotiating position, and only a policy-level officer can work at the proper levels at Justice, OMB, and other agencies to help forge that critical, uniform, and unified administrative position.

Besides that, in addition to this internal process, there is the absolutely critical process of keeping non-parties informed, and these would include Congress' key committees, and entities such as States that may or may not be an actual direct party to particular negotiations.

This critical aspect of keeping those parties simultaneously informed of how negotiations are proceeding and getting feedback through the process permits the negotiator to determine, in advance, what is acceptable and what is unacceptable. That was very instrumental in helping an administration craft settlements that could come to Congress and be approved with a minimum of renegotiations here on the Hill.

Fourth, the negotiator must have solid support from the department. Any negotiator who gets his or her wings clipped by having their decisions rejected by the department or the administration quickly becomes a crippled entity whose effectiveness in subsequent dealings will be greatly diminished. I think senior-level policy officers can generally guard against this.

There is one other factor that has bearing, and that is that an individual at the table with an authoritative portfolio and sufficient backing can effectively close deals that would otherwise be lost.

I think in negotiation there is generally an ephemeral moment when the chemistry among the parties is such that you have an opportunity to close the deal, and the negotiators must be in an authoritative position to seize that moment and bring these things to closure. If it goes by, sometimes getting that chemistry might not come back for months at a time, and a really important opportunity would have been lost.

Let me just conclude by reiterating the keys to successful pursuit, in my experience, of a very valuable negotiation policy: First, a decision must come from the top to exercise leadership and make the requisite commitment to bringing outstanding claims to settlement; second, an accountable policy-level person must be put in the lead and provided with the necessary and authority resources to effectively bargain; third, diligent good faith in the form of consistent and reliable administration positions must be maintained; fourth, critical interested parties, such as Congress, must be kept informed so that settlements can be approved with a minimum of renegotiation.

This kind of an approach was successfully employed in 1982 through 1985, and bore fruit. I commend it to your attention. I think that the opportunity is there; it is just that the opportunity needs to be seized. Thank you very much.

[Prepared statement of Mr. Horn appears in appendix.]

The CHAIRMAN. I appreciate your concise testimony.

I gather from your statement that you would favor what other witnesses have suggested: That the administration, the Government of the United States, assign a high-level, policy-level type person to be the chief coordinator or chief spokesman or chief negotiator who is authorized to speak for and in behalf of the Government of the United States, and is authorized to commit, in the name of the Government of the United States, whatever needs to be committed?

Mr. HORN. I think that is absolutely essential to really moving these things along.

The CHAIRMAN. I think I am getting the message, sir. Thank you very much.

I now call on Mr. Clinton.

STATEMENT OF MICHAEL J. CLINTON, FORMER SPECIAL ASSISTANT TO THE FORMER UNDER SECRETARY OF THE DEPARTMENT OF THE INTERIOR, ANN DORE McLAUGHLIN, AND VICE PRESIDENT OF BOOKMAN-EDMONSTON ENGINEERING, INC., WASHINGTON, DC, TESTIFYING ON BEHALF OF HIMSELF AND FORMER UNDER SECRETARY McLAUGHLIN

Mr. CLINTON. Thank you, Mr. Chairman.

My name is Mike Clinton. I am vice president and Washington office manager for Bookman-Edmonston Engineering, Inc. That is a firm that specializes in water resources management.

My testimony today describes my experiences with addressing Indian water issues during the period from 1974, when I first got involved in this activity, to 1986, when I left the Department of the Interior.

In the interest of time, I will summarize my written statement that was provided to the staff, so that it can be placed in the record.

The committee had asked that Ann McLaughlin join us today. Because of long-standing travel commitments, Ms. McLaughlin is unable to be here today. She sends her regrets, as she supports the work of the committee to bring resolution to these long-standing controversies.

On February 23, Ms. McLaughlin and I appeared in front of the Special Committee on Investigations of the Select Committee on Indian Affairs. We would like our testimony to be included in the record as it describes the management strategies that we used as we addressed these controversies during the term that she and I were actively involved in them.

The CHAIRMAN. It is so ordered.

[Testimony appears in appendix.]

Mr. CLINTON. As you are aware, I served as Special Assistant to the Under Secretary for 2 years. You have heard Bill Horn's testimony describing his experience as a deputy under secretary. I bring a little different perspective to the problems than Bill. The difference between those two titles is that Bill was a political, schedule C, appointee on the policy side; I was a career person who came up through the ranks and into the job that I had.

I was pleased to be involved in Indian water issues under seven secretaries, from Rogers Morton through Don Hodel. I saw each of those secretaries—every one of them—try to avoid the Indian water issue. None of them was successful. It came and dumped on their shoulders because the trustee role requires executive decisions in the Indian water area.

As a career employee, you learn how to deal with change. Your managers are continually turning over. The half-life of a political appointee is 9 months. Each careerist can expect, in the next 9 months, that, of the 10 political appointees who oversee his or her work, 5 of them are going to be gone.

The way you deal with that change is to build relationships and continually reeducate the new people who are coming in.

My work with Under Secretary McLaughlin, in my estimation, was a very classic example of that. She used me as her window into the bureaucracy. Over the years I was an employee of the Department, I developed many relationships with the water management community in the Western States. She used me as a window to get to know those people, as well.

Now, conversely, I used her. I used her as a window into the policy side, and when we needed executive decisions on funding approaches or leverage on parties we were negotiating with, Ms. McLaughlin was there and she went to bat and got those decisions and contacts made.

She was the Under Secretary of the department. As chief operating officer, I would expect she used maybe 5 or 10 percent of her time on Indian water rights settlement. She was there when we needed her, and the results of that collaboration speak for themselves. We were very deeply involved in three settlements that passed last year, and the result of that collaboration is something which I feel very happy to have been a part of.

My experience in the Government—and confirmed in the private sector—suggests to me that any program of this nature has to have two components: first and foremost, there needs to be an advocacy group out in the public who will support and sustain a program over the changes of administrations and Congresses. In this area, Ms. McLaughlin and I worked very closely with the ad hoc group that Governor Sullivan described. We worked to focus their advocacy, to help them understand how to work with the administration and the Congress. The workshops that they conducted last year were very much a part of the strategy that Ms. McLaughlin and I suggested to the ad hoc group over the couple of years that we worked with them.

The second component for such a program is a bureaucratic capability that will sustain the institutional memory over changes in administration. We worked very closely to train people, to bring career people into the negotiating teams in a support role, and sometimes as a primary negotiator, to build that cadre of expertise.

One of the challenges for this new administration that is coming on board has to be to reinvigorate and to resuscitate that career staff capability.

Earlier today Senator McCain was very complimentary of the role that I had played while I was at Interior—particularly with the settlements in his State. I had three wonderful things going for me: first and foremost, the people who had to live with these controversies had decided that they had had enough of litigation. They had decided—and I must give my fellow attorneys due regard—to abandon their litigation strategies and move from there to look at what their needs were and see if, through collaboration with their neighbors, they could get their needs met.

That is what happened, and the results, again, speak for themselves.

Second, I had the good fortune to work for Ms. McLaughlin. As I said before, when I needed clout within the administration, she went to bat and got it for me. That is the kind of a relationship that I was fortunate enough to be able to work with.

Last, and very importantly, I had the assistance of State governments and I had the assistance of the Congressional delegations. Many times during the Salt River settlements, negoiations, Senator McCain called the people I was negotiating with to tell them, "Get yourselves in line, get yourselves to where you can find a way to co-exist with your neighbors. We need this settlement."

It was my work as a facilitator, Senator McCain's work as an instigator and a prod, and the opportunity we had to use other leverages from the department that closed that Salt River settlement. Similar processes took place in the other two settlements that were enacted last year.

The group process was straight out of the sociology books, but the key was that all parties wanted a settlement. They all exhibited the persistence and invested the energy to stay with it until the deal was closed. That really was the secret to the success we had last year.

Let me close with some final thoughts. As this committee considers possible recommendations to the administration on management of an Indian water claims program, there are three or four things that I think are important.

Settlements require a strong legal capability in Indian water law, since negotiations on behalf of the trustee have to start from a position of power and strength. That capability in the Department of the Interior has atrophied very badly in the last few years. The Department needs to protect and enhance that capability, and I feel it is something this committee ought to take a look at.

The representation of constituency groups needs to have a better avenue into the decision processes. Many decisions are made by the department without adequate input from the parties that have that interest. In any negotiating program, those decisions the department makes on what its negotiating strategies are need to have input from the affected interests because the department can make decisions that very strongly focus where a settlement ought to go.

Cross-cutting conflicts need to be addressed. They need to be addressed in neutral forums. If you put those forums for discussion where the budget people are, you're going to get decisions that don't spend money. If you put them where the attorneys are, you'll get decisions that suggest you ought to litigate. If you put them where Indian Affairs is or Reclamation is, you'll end up with tilted results. You need a neutral forum.

In my estimation, the immediate Office of the Secretary or the Under Secretary is the only place where that neutral forum exists.

There have been suggestions that a forum ought to be established in the White House. I feel that the White House ought to have a strong advocacy role, but the place where those conflicts center is in the Department of the Interior, and in the immediate Office of the Secretary, and that's the place where that forum needs to be.

Last, we have heard lots of discussion today about guidelines. Any guidelines that are established must retain a case-by-case flexibility that is needed for effectively resolving these controversies.

In other words, I don't believe financial guidelines are appropriate; I believe there should be guidelines to establish the coordination between agencies and between advocacy groups within the Department of the Interior, and those guidelines are essential and need to be established.

But I think you should not limit the creativity of the settlement parties that can allow them to fashion an approach and a settlement that meets their unique needs. Formulas for funding and cost sharing will limit that creativity.

This concludes my testimony. I would be pleased to respond to questions from the committee as you may desire.

[Prepared statement of Mr. Clinton appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Clinton.

You made a very interesting observation in that you worked with several secretaries of the Interior, and that all of them tried their best to avoid getting involved in water right matters. I don't think it is something new, because the Congress of the United States, over the years, has tried its best to avoid getting involved in water rights unless they are forced to.

But I can assure you that this committee will not avoid that issue, because we feel that it is part of our trust obligation and trust responsibility to look into this matter, and that is why we are holding this hearing. This is just the first of many. We hope that we can call upon all of you to assist us in coming forth with some sort of omnibus legislation.

Mr. CLINTON. I commend you, Mr. Chairman.

The CHAIRMAN. I realize the politics that are involved in this. It is not an issue in which unanimity exists. You will have many diverse voices involved. But we are going to take a crack at it, because I think it is our responsibility.

I want to thank you for your observations and the inside view of how these things happen, because it will be very helpful as we go forth in drafting legislation.

Now I am honored to call upon the Deputy Attorney General of the State of Colorado, General Witte, as our final witness this afternoon.

STATEMENT OF HON. LOIS G. WITTE, DEPUTY ATTORNEY GENERAL, NATURAL RESOURCES DIVISION, OFFICE OF THE ATTORNEY GENERAL, COLORADO, REPRESENTING HON. DUANE WOODARD, ATTORNEY GENERAL, COLORADO

Ms. WITTE. Thank you, Senator. I appreciate the opportunity to address the committee today. It was only with the support of this committee that we were able to get our settlement through last year, and if there is any way we can provide our insights into the process, we are pleased to do so.

My name is Lois Witte. I am the Deputy Attorney General in the Natural Resources Section. I represent Attorney General Duane Woodard of the State of Colorado, who was not able to be here today but, because of his commitment to the issue, sent me in his stead.

Attorney General Woodard, as well as myself, has been involved with the Colorado Ute Indian water rights settlement since the settlement negotiations began in 1984. The negotiations did, indeed, start with a letter that Attorney General Woodard wrote to the two Ute Indian Tribes inviting them to the negotiation table. There was a favorable response from the tribes and the Federal Government, and that began the negotiation process in 1985.

At the outset, I would like to emphasize the value placed by Attorney General Woodard on negotiating these types of claims. We do not believe that litigation is an acceptable route to resolve these problems. In many instances, litigation gives the tribes only a paper water right and does not put any wet water on the reservation. Without wet water, the real purpose of this process has not been fulfilled.

We also think that litigation places high social and economic costs on the local communities—costs which are borne by the Indians and non-Indians. They must also attempt to live with the bitterness that ensues from this type of litigation. Those costs should be avoided, as well as the uncertainty and the stress placed on those Indian and non-Indian relationships.

The value that Attorney General Woodard places on these settlements is one shared by the Conference of Western Attorneys General. The Conference of Western Attorneys General engaged in a lengthy study of reserved rights negotiations. The primary emphasis of this study was on the negotiation of Indian water right claims. The Conference of Western Attorneys General examined many of the Indian negotiations that had occurred. They also had meetings with many of the Federal, State, and tribal parties and received their input as well as providing them with an opportunity to review the information that was put out. So the Conference of Western Attorneys General has invested a great deal of energy in trying to educate people on what participant should look at during the negotiation process, what the issues are that have to be examined, when these issues should be examined, who needs to be at the negotiating table, and how to accomplish some of the very detailed and complex aspects of a negotiated settlement.

As previously stated, Attorney General Woodard's personal commitment to this is very strong. However, while the Federal Government has professed to support a policy of negotiated resolution of these claims, it is our position that it is not a policy which is uniformly endorsed within the Federal Government. The lack of Federal commitment is most clearly reflected in the lack of the Federal institutional framework necessary to negotiate these claims. For many of the reasons I have cited in my written statement, reasons that have already been discussed by this panel today, there are certain institutional requirements that need to be in place if successful negotiated settlements are to occur. Absent these requirements, it is a very difficult process, if not an impossible one, for States and tribes to undertake.

With this, however, I do not intend to level criticism at any of the Federal officials who were involved in the Colorado negotiation process. I think that we had the help and benefit and expertise of Mike Clinton, as well as others, and it was only through their hard work, dedication and determination that we got as far as we did.

I do think, however, the lack of the institutional framework constricted their ability to do their job.

I am now going to briefly set out some of the reasons Colorado believes that there was not a strong Federal commitment to the negotiation process. Colorado and the two Ute Indian Tribes have been engaged in the negotiation process with the Federal Government since 1984.

On June 30, 1986, there was a binding cost-share agreement signed by the Federal Government, the State of Colorado, and the tribes. This cost-share agreement was certified by the Secretary of the Interior to be a reasonable, non-Federal cost-share contribution to the construction costs of the Animas-La Plata project and the resolution of the tribal reserved right claims to water. It was also approved by the Office of Management and Budget.

This agreement, accomplished several things. It established a tribal development fund and called for State and Federal commitments to that fund. The State committed to pay for a pipeline to be built to the town of Towaoc,atown located on the Ute Mountain Ute Indian Reservation which did not have a domestic drinking water supply. The State also committed to put an additional $5 million in the tribal development fund to provide the tribe with funding adquate to build the infrastructure necessary to put their water resources to beneficial use.

With respect to the cost-share for the Animas-La Plata project the State further committed $30 million to be put in escrow for construction of the Animas-La Plata project, a project which is the cornerstone of our settlement. The Animas-La Plata project had been selected by the tribe and the local people, to be the only solution available to the problem of an insufficient existing supply of water to meet the Indian and non-Indian demands..

The cost-share agreement also called for the State of Colorado to pay $5.6 million for the construction of Ridges Basin, as needed.

The cost-share agreement also set out specific obligations for the Federal Government. A 12-year construction schedule for the Animas-La Plata project was specifically negotiated and found critical to minimize the interest construction cost. The Federal Government also committed to pay $49.5 million to the tribal development fund. We negotiated a 3-year payment schedule for those funds.

That binding cost-share agreement was, however, contingent on a final resolution of the tribe's reserved water right claims. Although the State and the tribes had previously entered into an Agreement in Principle, which set out the parameters of a negotiated settlement they could agree to, the Federal Government had not been involved in that negotiation process. We began a renegotiation of the Agreement in principle of consequent with the Federal Government. Those efforts culminated December 10, 1986, with the Final Settlement Agreement.

The Final Settlement Agreement was, again, signed by the Department of Interior, the Department of Justice, the two tribes, the State of Colorado, and various water users. All these entities had committed their time, their resources, and their money to these settlement projects.

This final settlement agreement, as you are aware, however, did not end the process. In that final settlement agreement it provided a three-step approach that had to be filled before the tribes claims would be fully satisfied. The first leg of that approach was necessary Federal legislation, and that Federal legislation was the legislation that this committee helped get passed in November 1988.

The second leg of that was necessary State legislation, contributions, appropriations to the tribal development fund, setting up of the escrow account for $30 million, as well as payment of an additional $5 million to the tribal development fund, $5.6 million to construction of Ridges Basin.

It also called for the entry of a final consent decree, which would, in the Colorado District Court, conclusively decree these rights to the tribes.

Again, the settlement context was done in the context of negotiation, and the final decree would be the document that would vest the rights in the tribe.

With respect to the first requirement of the three legs, everything required of the Federal Government has been completed except for the Federal appropriations to the tribal development fund, as well as the money necessary to put the Animas LaPlata on a 12-year construction schedule.

With respect to the State, all funds necessary have been authorized and appropriated. We have, in fact, begun construction of the pipeline to the town of Toyok. It is my belief that is almost finished. The town of Toyok will be getting its drinking water supplied.

We have set up the escrow account and put our money into the escrow account. We have authorized and appropriated—waiting signature by the governor—the $5.6 million for Ridges Basin. Last year we authorized our payment of $5 million to the tribal development fund.

So the only thing that the settlement is left hanging on now are these final appropriations from the Federal Government—and these are critical to our process.

In the public law that was passed in November, there is a clause at the end of the law which can completely void the agreement, and that clause is found in section 13. It says that the act shall only take effect on the date the final consent decree is entered in the Colorado District Court. The contingency that the tribes insisted to protect their interests that had to be met before a final consent decree can be entered is payment of the tribal development funds. So we are finding ourselves in a Catch-22.

We also have in this act a deadline of December 31, 1991. Now, if all funds are not fully appropriated by that time, the act requires that the money shall be returned to the Federal Government and shall not go to the tribes, and that the agreement is then voidable.

So we could find ourselves, in 1991, after all the work, dedication, and effort of all the parties, back to where we were in 1984 when we started the negotiation process. And this is due to our inability to get the money from the administration to live up to the commitments that were made in those two agreements and legislation.

As closing, I would also like to give my recommendations as to what is needed in the negotiation process. The first thing is that I fully agree with what other people have stated about the need to establish an institutional framework for these negotiations. There needs to be someone in Interior that is directly responsible and has the ability to speak for the Department and can be present at the negotiation table, or someone who is closely connected with him, to deliver the deal when the deal gets made.

Second, while States fully appreciate the realities of the national budget and appreciate the fact that we cannot look to the Federal Government to solve our solutions, we do think that there is a responsibility that the Federal Government owes both to the Indian community and to the non-Indians in the west to provide Federal money to help these settlements work. I think the trust obligation to the tribes goes beyond litigating their claims. I think the trust obligation goes to ensuring that the tribes actually get the resource necessary to make their reservations homelands.

With respect to the non-Indians in the west, I do think that there is a Federal obligation. I think many of the reclamation projects and many of the agreements made between States were made with the understanding that all States—on the Colorado River system, at least—would have to share equally in the burden of sharing the water and making water available to the tribes.

Third, I think that one thing that could be very useful for the Department of Interior to do in these negotiations—and also, perhaps, in litigation if the parties needed to litigate some of the legal issues—is that there be money available to provide the necessary technical data that can be jointly shared by the tribes and the State.

I think what we need to avoid is creating a situation of the battle of the experts where States go out and provide a great deal of money hiring experts, tribes go out and provide a great deal of money hiring their experts, BIA also goes out and hires their experts.

To do these negotiation settlements or any type of discussion about how far the parties can proceed with respect to their negotiations, you need to know, first, what water is available. You have to have some idea of the flow, have that information on stream flows available to all the parties, as well as available ground water sources.

Second, you have to know what the tribal needs are. You have to be able to inventory existing uses. There has to be some way to examine what the future development of that tribe might be. I know it is difficult to crystal ball these things, but the tribes do need information for their planning if they are going to make these decisions and put them in concrete now.

Third, I also think that you need to know what the existing non-Indian uses are in the stream so you have some idea of what demands are placed.

Fourth, I don't think it is a bad idea to have some examination of solutions to the problem. Perhaps if there was some study to see if there is any way to do conservation techniques, or, if that is not possible, if construction of a water project is needed.

If we could perhaps have some help in that area to look at those possible solutions to the problem, that would help the parties by providing the information and opening up the range of options.

As I have stated previously, I think that there needs to be someone in Interior that could commit Interior. Likewise, I think that there should be designated Federal officials that are authorized to speak not just for Interior, but also for the Department of Justice and Office of Management and Budget throughout the negotiation process.

It is very frustrating for States to negotiate first with one department to give the delicate balancing required there, and give up and think they have reached bottom line, only to go to the next Federal department and then meet all their demands, negotiate again, and then go on the line with the next one. It is just a never-ending process, and I think it would be better served if all the necessary parties were at the negotiating table.

Fifth, although I do concur with Mike Clinton and I do not believe that you can establish a uniform standard of policy within the Office of Management and Budget that is going to guide all settlements, because I also believe that these are very individual settlements that have to be very sensitive to the local needs and to the specifics of the situation, I do believe that we need some policy guidelines and standards from the Office of Management and Budget.

For example, the States need to know whether the Office of Management and Budget is only going to contrite what it considers to be the cost of litigation to the settlement. Will the Office of Management and Budget consider any money it may owe to the tribes based on any other trust obligations? Will the Office of Management and Budget consider breach of trust claims and give a dollar value to those things? I think we need some understanding of the criteria under which those financial decisions are made, and those have to be set out for the State so they have an opportunity to comment on those.

Next, as stated, I believe that all parties involved with the process really have to be sensitive to the local needs of the State and the tribe. When they do craft a solution that has been difficult, I think that while there certainly is justification for national policies, that the individuals involved in those situations may need special consideration, and that has to be closely examined because these things can't be done on a cookie-cutter basis. They are very individual.

Last, I would only request that if we go through a 4-year process like Colorado has gone through and gotten two documents signed by the Department of the Interior, and also Federal legislation passed, that there be a way that we can commit the Federal administration to the settlement.

As stated, the administration didn't request the money for the budget, and one of the problems that we faced throughout the negotiation process was 1986 settlement guidelines imposed by Attorney General Meese on the staff which prohibits them from entering into any consent decrees which commit the administration to spend money, or which commit the Interior to even request that money be spent.

I think in these sorts of settlements, the parties need some finality provisions. It is very difficult to negotiate these deals knowing that at any moment they can be undone. If the parties are going to go through long negotiation processes to get a good result, they need to know that that result can be protected.

I have no further comments. I will be glad to answer any questions you may have.

[Prepared statement of Mr. Woodard appears in appendix.]

The **Chairman**. Thank you very much, Ms. Witte.

You indicated that there is a lack of commitment, a lack of institutional and bureaucratic infrastructure to carry out these negotiations. I think Mr. Clinton responded to all of that when he said that all his bosses tried their very best to avoid this. I can imagine why there is a lack. That is no secret. We will have to make a change to that.

As to the matter of the funds, it is an embarrassment on our part, but we are going to do our best to provide those funds, notwithstanding the budgetary constraints. An obligation is an obligation.

It will not be easy, but at least we will make an attempt at it.

You have been most patient waiting these many hours to testify. It has been very helpful.

As I indicated, this is just the beginning of a process. We hope that, in due time, we will come forth with legislation that we can present to the Senate for its consideration. I do not know when that will come about, but in the process I hope that you can help us.

Ms. **Witte**. I would be glad to.

The **Chairman**. I thank all of you very much.

In closing, I would make one additional comment. I, too, agree that, given the choice, negotiation is the best path to follow, especially if I were a sovereign. Because, for a sovereign to litigate, that sovereign will have to give up part of its sovereignty—especially if the court is an agency of one of the litigants involved.

So I would urge my friends in Indian country, to the extent possible—even if it is a long process—to consider that negotiation may be better for you, because at least you don't give up your sovereignty.

I thank all of you very much.

With that, we stand adjourned.

[Whereupon, at 5:47 p.m., the committees were adjourned, to reconvene at the call of their respective Chairs.]

APPENDIX

Additional Material Submitted for the Record

OPENING STATEMENT OF SENATOR DENNIS DECONCINI
SELECT COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARINGS
ON
INDIAN WATER POLICY

MR. CHAIRMAN, THANK YOU FOR THE FOR THE OPPORTUNITY TO SHARE WITH THE COMMITTEE MY THOUGHTS ON THIS CRITICAL ISSUE IN THE WEST --- THE RESOLVING OF OUTSTANDING INDIAN WATER RIGHTS DISPUTES.

I COMMEND YOU FOR YOUR OUTSTANDING LEADERSHIP ON THIS ISSUE OF GREAT IMPORTANCE. HAD IT NOT BEEN FOR YOUR TIRELESS EFFORTS IN THIS AREA, WE WOULD NOT HAVE BEEN SUCCESSFUL IN THE PASSAGE LAST YEAR OF THE THREE NEGOTIATED SETTLEMENTS.

MR. CHAIRMAN, OVER FIFTY LAWSUITS ARE NOW PENDING BEFORE STATE AND FEDERAL COURTS TO RESOLVE DISPUTES OVER TRIBAL RIGHTS TO WATER FLOWING ON OR PAST INDIAN RESERVATIONS.

LITIGATION IS COSTLY, TIME CONSUMING, UNCERTAIN IN OUTCOME, AND ONCE DECIDED, CAN DISPLACE EXISTING WATER USES AND PROVIDE ONLY PAPER RIGHTS, NOT "WET WATER."

THE PROLONGED UNCERTAINTY CLOUDS THE VALIDITY OF WATER RIGHTS FOR INDIANS AND NON-INDIANS ALIKE, FORESTALLING INVESTMENT BASED ON THE AVAILABILITY OF, AND RIGHTS TO WATER, THUS HURTING TRIBES, BUSINESSES, STATES AND THE NATION.

AS A RESULT OF THIS PENDING LITIGATION , THE PREVIOUS ADMINISTRATION UNDERTOOK AN AGGRESSIVE PROGRAM TO NEGOTIATE SETTLEMENTS FOR THE OUTSTANDING INDIAN WATER RIGHTS CLAIMS THROUGHOUT THE WEST.

SECRETARY LUJAN INDICATES THAT THIS POLICY WILL CONTINUE.

LAST CONGRESS, THREE SETTLEMENTS WERE ENACTED INTO LAW --- THE SALT RIVER PIMA-MARICOPA IN ARIZONA, SAN LUIS REY IN CALIFORNIA AND COLORADO UTE IN COLORADO.

THESE SETTLEMENTS ANTICIPATED FEDERAL FUNDING IN FY 90 OF $76 MILLION. HOWEVER, IN THE FY 90 BUDGET REQUEST, THERE IS ONLY $15 MILLION.

THE UNDERFUNDING OF THESE RECENTLY COMPLETED SETTLEMENTS IS GIVING THE NON-FEDERAL PARTICIPANTS IN NEGOTIATIONS TO RESOLVE OTHER WATER RIGHTS DISPUTES CAUSE TO QUESTION THE CREDIBILITY OF FEDERAL INTENT IN MEETING ITS OBLIGATIONS.

IT IS IMPORTANT TO REMEMBER THAT THESE NEGOTIATED SETTLEMENTS ARE SAVING THE U.S. TAXPAYER MONEY IN THE LONG RUN. REACHING OUT OF COURT SETTLEMENTS ULTIMATELY REDUCES THE LEGAL EXPOSURE OF THE U.S.

FURTHERMORE, IN EACH OF THE NEGOTIATED SETTLEMENTS, THERE ARE SCHEDULES FOR EACH OF THE PARTICIPANTS, INCLUDING FEDERAL, TO MEET ITS OBLIGATIONS.

IN THE EVENT OF A LACK OF TIMELINESS IN MEETING THESE SCHEDULES, THERE ARE PROVISIONS FOR INTEREST PENALTIES WHICH COULD POSSIBLY RESULT IN GREATER FEDERAL COSTS.

AS YOU CAN SEE MR. CHAIRMAN, IT IS CERTAINLY IN THE BEST INTERESTS OF THE U.S. TAXPAYER TO FUND THE FEDERAL OBLIGATIONS AS PRESCRIBED IN THESE SETTLEMENTS.

AS YOU KNOW MR. CHAIRMAN, SENATOR DOMENICI AND I CO-CHAIR THE WESTERN SENATE COALITION AND WE HAVE BEEN WORKING WITH THE WESTERN GOVERNORS ASSOCIATION IN TRYING TO DEVELOP POLICY DIRECTION CONCERNING INDIAN WATER RIGHTS SETTLEMENTS. I SEE ON THE WITNESS LIST THAT GOVERNOR SULLIVAN IS SCHEDULED TO TESTIFY TODAY AND I WANT TO PUBLICLY THANK THE GOVERNOR FOR HIS ROLE IN ESTABLISHING THE INDIAN WATER RIGHTS AD-HOC GROUP. HE TRULY BEEN A LEALDER IN THIS ARENA.

MR. CHAIRMAN, I APOLOGIZE THAT I HAVE TO DEPART THIS IMPORTANT HEARING EARLY, BUT I HAVE PREVIOUS SCHEDULE COMMITMENTS. I CAN HOWEVER, ASSURE YOU THAT I WILL CAREFULLY REVIEW THE RECORD OF THIS PROCEEDING AND I WILL CONTINUE WORK WITH YOU AND THE COMMITTEE ON THIS MOST IMPORTANT ISSUE.

/DSS

Testimony of Charles F. Wilkinson

My name is Charles F. Wilkinson, Professor of Law at the University of Colorado School of Law. In my research and writing, I concentrate on Indian Law, Water Law, Public Land Law, and, in general, natural resources issues in the American West. In addition to numerous articles in law reviews and non-legal journals, I am co-author of Federal Public Land and Resources Law (Foundation Press; 2nd Ed., 1986) (with Coggins) and Cases and Materials on Federal Indian Law (West Publishing Co.; 2nd Ed. 1986) (with Getches); Managing Editor of Felix S. Cohen's Handbook of Federal Indian Law (Michie-Bobbs Merrill; 1982 ed.); and author of American Indians, Time, and the Law (Yale University Press; 1987).

I am attaching one of my articles on water law, Western Water Law in Transition, 56 University of Colorado Law Review 317 (1985). It generally sets out my views on the many ways in which outmoded rules in western water law are being reformed by courts, state legislatures, and Congress. My most recent piece on this subject is Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine, XXIV Land and Water Law Review 1 (1988). I will summarize my views on the relationship between western state water law and Indian water rights during my oral testimony.

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WESTERN WATER LAW IN TRANSITION

CHARLES F. WILKINSON*

There is an uneasy, unsettled air about western water law and policy today. This is ironic and even revolutionary because certainty is the central guarantee that water law has always held out in the American West. Nevertheless, there is no denying that we are in the process of reevaluating water law and policy and of adjusting old and established uses in light of modern demands.

This transition, which is likely to accelerate, is born of a changing society in the American West. Law tends over time to reflect societal values, and this has always been signally true of western water law. For this reason, it may be helpful to place matters in perspective by looking briefly at the forces that historically have shaped water law and at the new set of factors that are likely to determine it in years to come.

The prior appropriation doctrine, the core of western water law, was created to meet the felt needs of the mining camps during the California gold rush.[1] Water law in the eastern United States and in England employed the riparian doctrine, which recognized water rights in each owner of land adjoining a stream or lake.[2] Riparian owners effectively shared the watercourse and were required to respect the rights of other landowners to use water in the future. Thus, although the riparian decisions display some deference to existing economic uses,[3] a landowner could not substantially diminish the flow of a river because of the duty to respect possible future water development.

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[1] For a comprehensive and engaging history of western water rights, see R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

[2] On the riparian doctrine, see, e.g., Davis, *The Right to Use Water in the Eastern States*, in 7 WATER AND WATER RIGHTS 27-185 (R. Clark 1976) [hereinafter cited as Clark]; II W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 1-144 (1974) [hereinafter cited as

Riparian law viewed the watershed as an integral natural unit. Exportation out of the watershed was prohibited or disfavored. Water was valued as an amenity that added considerably to the worth and beauty of all parcels of land along the watercourse.

This was nonsense to the utilitarian miners who flooded to the gold- and silver-bearing deposits of the West in the middle of the nineteenth century. They were there on business, not in pursuit of amenities. Water was the linchpin of the miners' operations, whether they were washing river gravel away from the gold dust and nuggets with pans, sluices or long toms; slashing away at hillsides with high-power hydraulic hoses used to blast out placer deposits; or transporting water twenty miles or more to remote mining towns such as Mokelumne Hill or Columbia by means of the serpentine canals that still wind across the gold country.[4]

Thus mining was water intensive from the beginning. In addition, water was scarce in those hot, dry foothills. The mining camps had no use for a riparian law, developed thousands of miles away in country where water was plentiful, that called for most water to be left as is. Water was not an amenity in gold rush times, it was an engine. Mining—that is, society— could not proceed unless water could be assured in sufficient and certain quantities.

The miners developed their own customs. Just as the first miner to stake a claim was accorded the right to work the area,[5] so too was the first user of water considered to have an absolute right of priority. The Supreme Court of the first western state, California, promptly approved the miners' rules in *Irwin v. Phillips*.[6] In this justly famous opinion, the justices stated that "courts are bound to take notice of the political and social condition of the country which they judicially rule."[7] The practice of respecting senior uses of water had been "firmly fixed" by "a universal sense of necessity and propriety" in the mining camps, and the court upheld those societal values.[8] Congress approved of the miners' ground rules in 1866 and 1870.[9] Beginning with Colorado,[10] the Rocky Mountain states followed suit, as did the United States Supreme Court, which announced in 1935 that local laws generally governed the acquisition of water rights in the West.[11]

These rules comprised the prior appropriation doctrine, which has become the deeply ingrained water law of every western state, although California, Washington, and Nebraska retain remnants of the riparian scheme. Prior appropriation rejects the riparian doctrine wholesale. The first user gets a guaranteed supply of water. In times of shortage, junior users are cut off according to their order of priority. There is no sharing of water. There is no need to preserve water in a watercourse. A stream or lake can be drained low or dried up entirely, as has occurred with hundreds of western rivers and streams, even the lower Colorado. These precepts reflect the belief that the wisest state

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HUTCHINS]; Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 621 (1968). Although riparian law is sometimes stated to be an English creation, American cases such as Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.R.I. 1827), had a significant impact in the English decisions. On the development of the doctrine, see generally Maas & Zobel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?* 10 PUB. POLICY 109 (1960).

[3] *See, e.g.*, Strobel v. Kerr Salt Co., 164 N.Y. 303, 321, 58 N.E. 142, 147 (1900) ("It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water."). The *Restatement of Torts* explicitly includes "the protection of existing values of water uses, land, investments and enterprises" as one of the balancing factors in determining the extent of riparian rights. RESTATEMENT (SECOND) OF TORTS § 850A(h) (1979).

[4] On the role of the water supply in early mining operations, see generally R. PAUL, CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST 147-70 (1947). Paul quotes the following excerpt from the Sacramento Weekly Union, July 22, 1854, concerning the use of hydraulic power at a claim at Iowa Hill:

> With a perpendicular column of water 120 feet high, in a strong hose, of which they work two, ten men who own the claim are enabled to run off hundreds of tons of dirt daily. So great is the force employed, that two men with the pipes, by directing streams of water against the base of the high bank, will cut it away to such an extent as to cause immense slides of earth, which often bring with them large trees and heavy boulders. To carry off these immense masses of dirt they have constructed two sluices, one for the paying and the other for the non-paying dirt. . . . After these immense masses of earth are undermined and brought down by the streams forced from the pipes, those same streams are turned upon the tons of fallen earth, and it melts away before them, and is carried away through the sluices with almost as much rapidity as if it were a bank of snow. No such labor-saving power has ever been introduced to assist the miner in his operations.

Id. at 155.

[5] *See, e.g.*, Hicks v. Bell, 3 Cal. 219 (1853).

[6] 5 Cal. 140 (1855).

[7] *Id.* at 146.

[8] *Id.* On the background of *Irwin v. Phillips*, see Littlefield, *Water Rights During the California Gold Rush: Conflicts Over Economic Points of View*, XIV WEST. HIST. Q. 415, 429-31 (1983).

[9] *See* Act of July 26, 1866, ch. 262, 14 Stat. 251 (confirming rights-of-way and appropriations of water on the public lands, as against claims by the United States, if established pursuant to state law or local custom); Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (providing that all subsequent federal patents would be subject to rights established under the Act of 1866).

[10] *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

[11] California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935) ("What we hold is that following the [Desert Land Act] of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states. . . ."). The case is discussed *infra* note 38.

policy is a passive one: decisions on water use are best made by the private water users themselves.

Ranchers and farmers made up the next waves of settlers in the westward expansion. They, too, saw water as a commodity that was the essential resource in their operations. In most of the arid region west of the 100th meridian, annual precipitation averages less than twenty inches, the amount of water needed to dryfarm—that is, to farm with rainfall only. Almost everywhere in the West, water must be taken out of watercourses and applied artificially to the fields by irrigation. Appropriation law was well suited to meet the needs of farmers who depended on irrigation. The doctrine assured early appropriators of legal rights to a sure supply of water to put on their fields.

But in many areas throughout the West small farmers required more than a legal doctrine to get water to their fields. Crops needed water in the late summer and early fall, long after snowmelt from the mountains had flowed past. Potentially fertile farming areas often were located far from the rivers or on benchlands high above steep canyon walls. Private enterprise in the form of farming and ranching cooperative associations was inadequate to raise the capital to build dams for storing the spring runoff for summer irrigation or to construct canals and laterals for transporting the water.[12]

The federal government, keen to complete the settlement of the West, stepped in. The Reclamation Act of 1902[13] authorized funding for most of the big irrigation projects that now dot the region. Homestead entries boomed as new waves of settlers moved west to capitalize on the offer of nearly free farmland and water.[14] The reclamation program was heavily subsidized from the beginning—billions of federal dollars have been expended to provide cheap western water.[15] Subsi-

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[12] On various 19th-century attempts to bring irrigation water to the arid lands of the West, see P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 635-54 (1968). Wallace Stegner poignantly depicts a futile attempt to bring water to the now-verdant Boise Valley in ANGLE OF REPOSE (1971).

[13] 43 U.S.C. §§ 371-600(e) (1982).

[14] Although the original Homestead Act was enacted in 1862 and numerous variations on the theme were adopted by Congress both before and after, the two most active decades in the actual issuance of homestead patents were the 20 years immediately following the Reclamation Act of 1902. The most productive year was 1910, when entries were made on approximately 23 million acres. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 73 (1979).

[15] *See generally* NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 145-47 (1973); Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965); Ellis & DuMars, *The Two-Tiered Market in Western Water*, 57 NEB. L. REV. 245 (1978); Wilson, *Reclamation Subsidies and Their Present-Day Impact*, 1982 ARIZ. ST. L.J. 497. About 15% of all water in the west is supplied by the Bureau of Reclamation. IV U.S. Dep't of Commerce, Bureau of the Census, 1969 Census of Agriculture 82-83.

dized water for farming is also developed and supplied by special water districts, quasi-governmental organizations created under state law and usually dominated by irrigation interests.[16] Today, even accounting for the burgeoning water needs of the cities, irrigation consumes nearly ninety percent of all water in the West.[17]

These forces have been the main currents of traditional western water law. The field has been dominated by the themes of appropriation under state law; stable priority for historic uses; concern for private rights over public rights; preference for consumptive, usually commercial, uses; and the provision of subsidized water for irrigators. It goes virtually without saying that this range of nineteenth and early twentieth century priorities is not as broad as the spectrum of considerations that must be accommodated in current water policy.

First, we have become increasingly aware of budgetary restraints on governments. Subsidies of all stripes are increasingly being called into question. Second, the press of the continuing migration to the West has created unprecedented strains on water supplies, thus intensifying the scrutiny of wasteful practices. Third, post-World War II innovations in high-lift pumping equipment have allowed us to begin to tap the potential of the great reservoirs of ground water. But, a shortages have developed, we have learned that many ground wate aquifers are not renewable resources in the sense that surface water are; the annual recharge of some aquifers is so small that they amoun to stock resources that can be mined out, much like oil or coal depos its. Further, we have learned that ground water is usually hydrologi cally related to surface water, so that the traditional system of managing surface water and ground water separately fails to reflect the hydrologic reality: conjunctive management of underground and surface resources is required when the two connect up.[18] Fourth, we have become determined to abate water pollution, an issue given little or no attention in prior appropriation law.[19]

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[16] Special water districts deliver about one-half of all western water, some of it supplied to the by the Bureau of Reclamation. State laws allow most special districts to issue tax-exempt bonds. Vo ing rights and other aspects of participation in district activities, however, are often based on acreag ownership (one acre, one vote), even when district boundaries reach into urban areas. With votin weighted toward irrigation interests, the districts are able to promote and fund projects, ensure investment through the use of the tax-exempt bonds, provide subsidized water mainly for irrigatio and obligate all persons residing within district boundaries. A requirement that directors of the Imp rial Irrigation District must be landowners was struck down in California. Choudhry v. Free, 17 C 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976). The weighted voting structure of the Salt Riv Project in Arizona, however, has withstood constitutional challenges. Ball v. James, 451 U.S. 3 (1981). Justice White has accurately analyzed the effects of these voting provisions:

> It is apparent in this case that landowning irrigators are getting a free ride at the expense of the users of electricity. It would also seem apparent that except for the subsidy, utility rates would be lower. Of course, subsidizing agricultural operations may well be in the public interest in Arizona, but it does not follow that the amount of the subsidy and the manner in which it is provided should be totally in the hands of a select few.

Id. at 384 (dissenting opinion of Justice White). On special irrigation districts, see generally S *cial Project: Irrigation Districts*, 1982 ARIZ. ST. L.J. 345; NATURAL RESOURCES LAW CENTER, S CIAL WATER DISTRICTS: CHALLENGE FOR THE FUTURE (J. Corbridge ed. 1983).

[17] *See, e.g.*, U.S. DEPARTMENT OF INTERIOR, WESTWIDE STUDY REPORT ON CRIT WATER PROBLEMS FACING THE ELEVEN WESTERN STATES 46-47 (1975).

Fifth, we have revolutionized our concept of what western water is. It is no longer simply a commodity to be removed from a watercourse for use on farmland or in a factory. There is life and beauty in water. It is a valid use of water simply to allow it to remain in a stream or lake. In a sense, after first rejecting the riparian rule so resoundingly, we have reconsidered and have reached a deeply held consensus that there is undeniable merit in some aspects of riparianism: sufficient water absolutely must be available to meet a broad range of public environmental, recreational, ecological, and aesthetic needs.[20]

Finally, we have come to recognize that this body of water law and policy bred of the westward expansion must begin to account for the rights of Indians, to whom legally binding promises were made in order to open aboriginal land and resources for those who settled the West.[21] The truth is that since 1908, if not earlier, the main players in western water development have known that a shadow body of law existed based on the *Winters* doctrine.[22] They have known, too, that water allocated in contravention of the *Winters* doctrine might someday be called into question. The Western States Water Council recently prepared a report for the Western Governors' Association concluding that Indian water rights across the West may total over forty-five million acre feet per year, an amount more than three times the annual flow of the Colorado River.[23] That figure was rough, no more than a conscientious attempt to approximate the magnitude of the issue. But it stands in stark testament to the fact that Indian water rights are of front-line significance in modern western water policy.

Questions of equity pervade the dispute over Indian water rights. Farmers and ranchers built their operations, and their homes and families, on water rights they believed to be certain. They point to decrees issued by state judges to that effect. At the same time, the reclamation program proceeded on the backs of Indian people. Western water issues cannot be dealt with now or in the years to come without squarely confronting the legal and moral force of these words written by the National Water Commission in 1973:

> Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects. . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters. . . .[24]

Those, then, are the major developments and perceptions that have set a new context for western water law. Let me now speak to the manner in which these factors have shaken traditional concepts and will shape future law and policy.

My first point is one that may not seem fashionable at this juncture in history: it is that a significant federal presence in western water law and policy exists now, is unavoidable, and will steadily grow. I am not speaking here of dollars for reclamation projects, a kind of federal involvement western development interests have long coveted but that is sure to remain in decline. Rather, I refer to a range of substantive issues that lend themselves to national attention.

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[18] On groundwater, see generally R. FREEZE & J. CHERRY, GROUNDWATER (1979). On conjunctive use, see Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27B ROCKY MTN. MIN. L. INST. 1853 (1982). *See also, e.g.*, Aiken, *Ground Water Mining Law and Policy*, 53 U. COLO. L. REV. 505 (1982).

[19] *See generally* W. RODGERS, ENVIRONMENTAL LAW 354-550 (1977) and 187-205 (Supp. 1984).

[20] These conclusions are reflected in a number of modern movements, including the setting aside of large areas of land as wilderness, *e.g.*, R. NASH, WILDERNESS AND THE AMERICAN MIND (1983 rev. ed.); the increased concern for the rights of animals, *e.g.*, M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1983); the increased demand for recreational uses of water, *e.g.*, Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979); the provision in most western states for the establishment of instream, nonconsumptive water flows, *e.g.*, Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211; and the attention given to water issues in essays and works of fiction by modern western writers, *e.g.*, E. ABBEY, BEYOND THE WALL (1984); J. NICHOLS, THE MILAGRO BEANFIELD WAR (1974); W. STEGNER, THE SOUND OF MOUNTAIN WATER (1969).

[21] On Indian treaties, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 62-70 (1982 ed.).

[22] Federal power to preempt state water law was suggested in cases such as Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829), United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899), and United States v. Winans, 198 U.S. 371 (1905), but the first major explication of the doctrine was in Winters v. United States, 207 U.S. 564 (1908).

[23] *See* WESTERN GOVERNORS' ASSOCIATION, INDIAN WATER RIGHTS IN THE WEST (1984).

[24] NATIONAL WATER COMMISSION, *supra* note 15, at 474-75.

The inexorable demands of geography make persistent inroads on the fiercely held localism that drives most state water officials and leaders in the consumptive industries. The angular design of the western states almost wholly fails to account for water basin configurations. A short stretch of the Continental Divide along part of the Montana-Idaho border is the only place west of the 100th meridian where a river drainage marks a political boundary. Great rivers such as the Columbia and the Colorado are used as state lines, inviting water disputes. Only one of our major western river systems—the Sacramento-San Joaquin of California—exists within just one state. Only one other, the Klamath of Oregon and California, keeps within two states. All of the rest—the Upper Missouri, the Platte, the Arkansas, the Rio Grande, the Colorado, and the Columbia system— are multistate rivers. Each of their basins has numerous Indian reservations with federally guaranteed water rights. Further, the upper Missouri, Rio Grande, Colorado, Columbia, and several smaller rivers carry obligations to Canada or Mexico. Indeed, water policy on the Columbia is so encompassing that, for example, it must account for the fact that Idaho salmon travel thousands of miles in their lifetimes; these fish not only are harvested by sports, commercial, and tribal fishers in Idaho, Oregon, and Washington, but also are pursued by sports and commercial fishers in Alaska as well as by Canadian, Russian, and Japanese boats.[25] The inland Columbia River tribes filed suit against the state of Alaska for its regulatory practices involving Columbia River salmon.[26] The multifaceted pressures on the Columbia have led, among other things, to federal regulation of water flows in the Columbia to create favorable conditions for young salmon and steelhead heading out to sea.[27]

Western water—a moving, interstate, even international, resource sought by numerous commercial, recreational, and political interests—is not logically a matter to be left to the sole discretion of any single local jurisdiction. We have seen the federalizing of similar resource issues, including air pollution, toxic wastes, and even water pollution.[28] All of those programs allow considerable flexibility to the states, but essentially the states must find a way to achieve national standards. Ultimately, the pressures in these areas of natural resources law are not fundamentally different from the forces that led us to adopt national programs in areas such as shipping, securities and antitrust regulation, and labor relations.

Of course, historical factors often transcend logic, even the logic of political geography, and that has been preeminently true in western water policy. A mixture of industrial clout, pressure from state water agencies, a lack of concern on the part of eastern political interests, and a generally admirable desire of westerners to be left alone all have worked together to form the "Iron Triangle"—one point comprised of private western water development interests and the state agencies; another corner in the federal water development agencies; and a final point in the key congressional subcommittees controlled on these issues by western congressmen. The Iron Triangle blunted much of the compelling logic of comprehensive planning and created a system of outside funding and internal control, the best of both possible worlds for development interests: Congress provided heavily subsidized federal projects, but the water was distributed in accordance with state law, which in turn gave preferences to the consumptive users favored by the commodity-oriented developers represented in the Iron Triangle.[29] Federal funding of western water development projects became "almost ritualistic."[30]

The states continue to play a paramount role in western water law and policy, especially in determining rights to the use of water.[31] This dominance of state law, however, has seen a series of inroads since about World War II. The Secretary of the Interior effectively decreed water rights on the lower Colorado among the lower basin states by entering into water delivery contracts, and the Supreme

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[25] *See* Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 KAN. L. REV. 17 (1983).

[26] Yakima Indian Nation v. Baldridge, No. C80-342 T (W.D. Wash.) (filed June 4, 1982). The many parties have entered into a stipulation that effectively stays the litigation by agreeing that the primary mechanism for resolving the issues should not be the litigation but rather a commission established by the United States/Canada Pacific Salmon Treaty, signed at Ottawa on January 28, 1985. Stipulation and Order, *id.* (March 7, 1985).

[27] *See infra* note 45.

[28] *See* Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1251-1376 (1982).

[29] *See* P. FRADKIN, A RIVER NO MORE: THE COLORADO RIVER AND THE WEST 61-62 (1981).

[30] A. KNEESE & F. LEE BROWN, THE SOUTHWEST UNDER STRESS: NATIONAL RESOURCE DEVELOPMENT ISSUES IN A REGIONAL SETTING 76 (1981).

[31] The leading statement by the Supreme Court on congressional deference to state water law is California v. United States, 438 U.S. 645 (1978). For a comprehensive review of California v. United States, the Reclamation Act of 1902, and congressional deference to state water law, *see* Kelley, *Staging a Comeback— Section 8 of the Reclamation Act*, 18 U.C.D.L. REV. 97 (1984).

Court upheld the administrative action.[32] The Supreme Court enforces the demands of federalism by refereeing disputes among states in interstate watersheds.[33] The federal pollution laws have taken effect.[34] The Endangered Species Act requires sufficient flows to protect covered species.[35] Various laws regulating salmon and steelhead harvesting have affected water allocations.[36] The 1982 decision in *Sporhase v. Nebraska*[37] made it clear that the demands of interstate commerce can override the desire of any single state to ban exports of water. The Court found that states regulate water but do not own it, calling the notion of state ownership of water "a legal fiction."[38] A new era in management of the federal public lands, which comprise forty-eight percent of all land in the eleven western states, has imprinted water policy by promoting erosion-preventing practices on federal timber and range lands, by protecting key high-elevation watershed lands, by establishing wild and scenic rivers, and by setting reserved rights in many federal landholdings, including national parks,

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[32] Arizona v. California, 373 U.S. 546 (1963).

[33] *See, e.g.*, Colorado v. New Mexico, 104 S. Ct. 2433 (1984); Texas v. New Mexico, 103 S. Ct. 2558 (1983).

[34] *See supra* note 28.

[35] 16 U.S.C. §§ 1531-1543 (1982). *See, e.g.*, Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984), *cert. pending*; Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).

[36] *See generally infra* notes 44-45.

[37] 458 U.S. 941 (1982). *See* Tarlock, *So It's Not "Ours" — Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983). The most recent decision on the issue is City of El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M. 1984) (upholding constitutionality of most aspects of New Mexico's statute regulating groundwater transports, N.M. STAT. ANN. § 72-12B-1).

[38] 458 U.S. at 951. This has not stopped state courts from continuing to rely on the fiction of state ownership of water. *See, e.g.*, Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 166 (Mont. 1984).

State authority over water is ample, but it is based on reserved power under the tenth amendment, not on ownership. The famous statement in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935) ("What we hold is that following the [Desert Land Act] of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states....") is itself a legal fiction based on concepts of ownership. There was no need to "sever" water from the public domain, *id.* at 158, to establish state regulatory authority—such power always existed by dint of the tenth amendment unless preempted by federal authority. Thus state courts were correct in applying state water law on the public lands from the beginning. *See, e.g.*, Irwin v. Phillips, 9 Cal. 140 (1855). *C.f.*, California v. United States, 438 U.S. 645 (1978) (state law applies to federal reclamation projects unless overridden by specific congressional provision); United States v. New Mexico, 438 U.S. 696 (1978) (Congress has authority to establish federal reserved rights but state water law applies unless federal power actually exercised); Andrus v. Charlestone Stone Products, Inc., 436 U.S. 604, 614 (1978) (congressional water policy in the mining laws has been "passive" and has "affirmed the view that private water rights on federal lands were to be governed by local law and custom."). *See generally* Trelease, *Uneasy Federalism-State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 758-68 (1980); Wilkinson, *The Field of Public Land* [illegible] *Directions*, 1 PUB. LAND L. REV. 1, 19-23 (1980).

wildlife refuges, and wilderness areas.[39] And, of course, the balance point has shifted—although we are years from knowing how far—by the determination of Indian tribes to assert their *Winters* rights in order to help fulfill the essential treaty promise that their reservations be homelands.

State domination of water policy, then, has been grudgingly eroded, in fits and starts, on a number of fronts. We have developed, and will hold to, a policy matrix that recognizes a set of legitimate state interests in the allocation of water but that also accommodates larger national interests including the needs of downstream states and nations, water quality, recreation, the environment, and Indian tribes.

I do not pretend to be able to predict with complete accuracy the substance of future federal involvement. It is likely to include increased local cost-sharing and financing schemes,[40] but national participation in western water projects will continue, with subsidies of a much lesser magnitude and surely with greater concern for Indian interests. I expect that there will be few, if any, new projects without an Indian component. In addition, in spite of bitter opposition from development interests, environmentalists may succeed in lobbying Congress and the public land agencies for expanded federal requirements for instream flows to protect recreation and wildlife on federal lands. Further, we may well be near some form of federally mandated water conservation practices, especially concerning interstate ground water aquifers such as the Ogallala, where shortages are already so acute that valuable farmland has been forced out of production.[41]

The institutional form of federal action will be important in itself. Perhaps it will be in the fashion of administrative intervention, of which we have had one dramatic example when Interior Secretary Andrus used the Central Arizona Project as a lever to pressure Arizona into adopting a reform ground water code to conserve water and protect Indian water rights.[42] Such jawboning has been employed by the Interior Department in the past to encourage modernizing of state water laws.[43] We do well to remember that the federal funding sought by the states implicitly vests federal water agencies with such informal authority should they choose to exercise it.

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[39] *See* Cappaert v. United States, 426 U.S. 128 (1976) (national monument); Sierra Club v. Block, 14 E.L.R. 20626 (D. Colo. 1984) (wilderness areas); United States v. Denver, 656 P.2d 1 (Colo. 1982) (national park and monument); Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation, and Bureau of Land Management, 88 Interior Decisions 553 (1979) (Interior Department agencies, National Wilderness Preservation System, and National Wild and Scenic River System). Reserved rights in national forests were construed strictly in United States v. New Mexico, 438 U.S. 696 (1978).

[40] *See* R. SMITH, TROUBLED WATERS: FINANCING WATER IN THE WEST (1984).

[41] *See, e.g.*, M. BITTINGER & E. GREEN, YOU NEVER MISS THE WATER TILL . . . (THE OGALLALA STORY) (1980).

[42] *See, e.g.*, P. WILEY & R. GOTTLIEB, EMPIRES IN THE SUN: THE RISE OF THE NEW AMERICAN WEST 182 (1982). *See also infra* note 101.

New federal multipurpose water legislation could well look to the creation of regional bodies with state representation in recognition of the historic state role. One model is the Northwest Power Planning Council, established by the Northwest Power Act of 1980 to set energy and fisheries policy—major components of water policy—in the Columbia River Basin.[44] The Power Planning Council is created by federal law, and must meet a congressionally established mandate, but it is not a federal agency. Each of the four states appoints two members to the Commission, which is directed, among other things, to protect Indian fishing and water rights, instream flows, and wild fish runs.[45] It is an innovative attempt to attack the seemingly intractable water policy issues of the Pacific Northwest. The issues elsewhere are different—there are many more cattle, and many fewer salmon, in the upper Missouri and the Colorado basins than in the Columbia—but the institutional arrangement set out in the Northwest Power Act might be an appropriate way to give proper recognition both to national needs and state prerogatives.

But, whatever the specifics and whatever the positions of the current administration, my view is that people in this field act at their own peril if they fail to recognize the probability of an expanded federal role—not in the historic arena of funding development projects, but rather in the sphere of adopting substantive requirements to meet pressing contemporary needs. A set of large challenges must be resolved—hopefully soon—and their scope is such that the states by themselves cannot hope to tackle all aspects of them.

The second development I wish to explore is, in my judgment, likely to be far and away the most important substantive movement in both state and federal policy in the foreseeable future. It is conservation of water, the essential policy element in seeing that enough water is available for both old and new uses. Conservation will influence or

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[43] *See, e.g.*, R. DUNBAR, *supra* note 1, at 115-16, 120.

[44] *See* Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. §§ 839-839h (1982). On the legislative history of the Act, see Blumm & Johnson, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497 (1981).

[45] In implementing the 1980 Act, a major thrust of the Northwest Power Planning Council has been to focus on preservation of wild fish runs and maintenance of instream flows. One program has been the establishment of a "water budget," by which state fish and wildlife agencies and Indian tribes agree upon the release of a fixed volume of water during the spring runoff (April 15-June 15 of each year) in order to facilitate downstream migration of juvenile salmon and steelhead. *See* Wilkinson & Conner, *supra* note 23, at 92-94.

determine most proposed projects, disputes involving Indian water rights, and environmental controversies. Such a statement does not negate the fact that techniques other than conservation of water will doubtless be employed to distribute water to new uses in an efficient manner. Various devices will be employed to free up the transfer of water by reducing the costs and legal barriers that are now attendant to leases and sales.[46] We will see some interbasin transfers, although not the grandiose schemes for iceberg-towing, for undersea aqueducts, or for pipelines to transport water to the Southwest from the Columbia Basin or Hudson Bay.[47] They are neither cost effective nor politically or environmentally acceptable.

The primary method for dealing with the critical issue of creating new water supplies will be to conserve water from existing supplies.[48] For generations, water conservation has been defined chiefly as the construction of new water projects. But most of those proposals will have difficulty satisfying the scrutiny of this newly cost-conscious field. In addition, nearly all of the prime dam sites in the West have already been utilized. Even more fundamentally, water storage projects are conservation projects only in the sense that they capture water that would otherwise flow out to sea. True water conservation is a much broader concept requiring users to employ waste-saving practices designed to ensure that all, or a great percentage of, water is actually applied to the intended use and not to leaks, spills, or evaporation. A major source of new water is the conservation of water in existing uses.[49]

Literally every comprehensive study of water policy has stressed the central importance of conserving water.[50] There is waste in industry and in municipal systems, but misuse of water by irrigators holds special significance because so much water in the West is devoted to that purpose. Water waste is not an entirely precise term and can be given various physical and legal definitions. When I use the phrase in the irrigation context, I mean to include as waste any water unnecessary for farming if modern irrigation practices are employed; most water should be consumed by the crop, with some unavoidable losses in conveyance and application and, in some cases, for leaching of salts.[51] Thus elimination of waste in this commonly accepted sense does not require absolute efficiency but it does call for the elimination of antiquated practices.

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[46] *See* NATIONAL WATER COMMISSION, *supra* note 15, at 260-70. *See generally* Ellis & DuMars, *supra* note 15, at 356-58, and the authorities cited therein.

[47] *See, e.g.*, R. Schad, *Western Water Resources: Means to Augment the Supply*, in SYMPOSIUM, WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES at 113 (1980).

[48] Water conservation is discussed comprehensively in Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982); WATER AND AGRICULTURE IN THE WESTERN UNITED STATES: CONSERVATION, REALLOCATION AND MARKETS (G. Weatherford ed. 1982) [hereinafter cited as Weatherford]; CALIFORNIA DEPARTMENT OF WATER RESOURCES, WATER CONSERVATION IN CALIFORNIA (1984); CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT: AN ASSESSMENT AT MID-DECADE (1985); Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1 (1979); Kramer & Turner, *Prevention of Waste or Unreasonable Use of Water: The California Experience*, 1 AGRIC. L.J. 519 (1980).

[49] We have, of course, begun to apply this principle in the field of energy, where the pressure for development of new sources has been somewhat reduced by conservation practices. Water policy and energy policy can coincide, as is the case with production of hydroelectric and steam-electric power, both of which require large amounts of water.

[50] *See generally*, NATIONAL WATER COMMISSION, *supra* note 15; United States Department of Interior, Westwide Study Report on Critical Water Problems Facing the Eleven Western States (1975);

Although irrigation efficiency has improved in some areas, outmoded and inefficient irrigation practices continue to result in massive waste of water in most regions of the West. The primary causes are excessive runoff and seepage from uneven fields; seepage from earthen irrigation canals; evaporation from reservoirs and open conveyancing systems; excessive application of irrigation water to fields; and evapotranspiration by phreatophytes (noncrop, water-loving plants that consume large quantities of water).[52] The United States Soil Conservation Service (SCS) estimates that total annual water waste due to irrigation amounts to twenty-four million acre feet per year.[53] Thus, if the SCS's rough estimate is substantially accurate, each year irrigators cause an irrecoverable loss of water that is almost double the annual flow of the Colorado River and that exceeds the total volume of water consumed by all municipalities and industries in the nation.[54] Because of the high incidence of water use by western irrigators and because of widespread wasteful practices, irrigation in western states has been described by the United States Water Resources Council as "a prime candidate for water conservation"[55] and by the National Water Commission as affording "the greatest potential, as well as the greatest need, for water savings."[56]

Developing an effective program to combat waste of irrigation water is no simple task. Irrigation interests dominate water politics in both the state capitals and in Washington, D.C. In addition, identifying true waste is not always easy. Water from leaky ditches or from an overwatered field may reenter the stream as return flow and be available to downstream users. More efficient irrigation systems employing pumps or sprinklers may consume large amounts of electricity or gasoline, thus conflicting with the goal of energy conservation. In some cases, removing phreatophytes and lining canals can destroy wildlife habitat.[57] Further, there are important social and cultural issues. No one wants to declare war on the western rancher or farmer. Many marginal operations would be jeopardized by rigid conservation requirements that must be met immediately. It is unacceptable to force an end to farming and ranching operations and to the local traditions and open space that they contribute to the American West.

Nevertheless, good conservation practices can, over time, be adopted for western irrigation. Pioneer-style earthen ditches can be lined with cement to eliminate leaks and encroachment by phreatophytes. Water can be saved on fields by abandoning flood irrigation in favor of furrow, sprinkler, or trickle irrigation, methods that distribute water evenly and efficiently. Water can be conserved by laser-leveling of fields so that water does not collect in low spots or run off on slopes or in gulleys.[58] All of us should support tax incentives, low-interest loans, and other programs to provide incentives for farmers to achieve these ends.[59]

Governor's Comm'n to Review California's Water Law, Final Report (1978); United States Water Resources Council, The Nation's Water Resources 1975-2000 (1979).

[51] Definitions of waste are discussed in Shupe, *supra* note 48, at 489-91. Modern irrigation practices are discussed *infra* note 58, and accompanying text, and *infra* note 104 in connection with the Arizona Groundwater Management Act of 1980. One rule that has been used to justify excessive diversions is that irrigators need comply only with the conservation practices used by other irrigators in the local area. *See, e.g.*, Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal.2d 489, 45 P.2d 972, 997 (1935) (an irrigator "is entitled to make reasonable use of the water according to the general custom of the locality, so long as the custom does not involve unnecessary waste.")

[52] *See, e.g.*, U.S. Soil Conservation Service, Crop Consumptive Irrigation Requirements and Irrigation Efficiency Coefficients for the United States (Appendix to the National Analysis, Second National Water Assessment) (1976); U.S. Comptroller General, More and Better Uses Could Be Made of Billions of Gallons of Water By Improving Irrigation Delivery Systems (GAO CED-77-117, Sept. 2, 1977); U.S. General Accounting Office, Better Water Management Possible—But Constraints Need to be Overcome (GAO CED-79-1, Oct. 31, 1978).

[53] U.S. Soil Conservation Service, *supra* note 52, at 17. A similar conclusion was reached in Departments of Interior and Agriculture and Environmental Protection Agency, Interagency Task Force Report: Irrigation Water Use and Water 22-23 (1979) (loss of 21.1 million acre feet). Both estimates are for irrecoverable losses to the stream systems.

[54] NATIONAL WATER COMMISSION, *supra* note 15, at 11.

[55] United States Water Resources Council, *supra* note 50, vol. 1 at 21.

[56] NATIONAL WATER COMMISSION, *supra* note 15, at 299. In addition to its impact on water quantity, irrigation is a major factor in water pollution. *E.g.*, Johnson, *Our Salty Rivers: Legal and Institutional Approaches to Salinity Management*, 13 LAND & WATER L. REV. 441 (1978).

[57] *See, e.g.*, Ohmart, *A Riparian Case History: The Colorado River*, found in: Importance, Preservation, and Management of Riparian Habitat: A Symposium, U.S.D.A. General Technical Report RM-43 at 35-47 (1977) (describing bird species exhibiting a strong preference for cottonwood habitats, which are comprised of phreatophytes such as cottonwood, willow, mesquite, and the recently introduced salt cedar or *Tamarix*).

[58] These and other conservation measures are discussed in depth in Shupe, *supra* note 48, at 501-10. Importantly, Shupe points to a range of benefits to farmers, including reduced production costs, erosion control, and salinity amelioration, from good conservation practices. *Id.* at 513-17. *See also* CALIFORNIA DEPARTMENT OF WATER RESOURCES, WATER CONSERVATION IN CALIFORNIA 59-117 (1984).

[59] Several western state legislatures have provided loans and grants to irrigators for water devel-

But incentive programs must be accompanied by the sharp edge of compulsion. First, pricing policy should be used to phase out subsidies for water users and to force conservation by delivering water at its actual, higher cost. As The Conservation Foundation has said, "only rarely in the United States does any government treat water as if it were a valuable commodity."[60] With few exceptions, western states allow appropriations from streams, lakes, and aquifers without charge. Most developed water is supplied at subsidized rates; federal irrigation water is priced at nineteen percent of its real cost.[61] We should allow the message of reform-minded resource economists to take hold: the incentive to save water will be diminished so long as water can be obtained at an artificially low cost.[62]

Second, the courts and administrative agencies should accelerate the enforcement of the prohibitions against waste that have always been part of western water law. The state codes prohibit waste of water and typically make it a misdemeanor.[63] Historically, these provisions have been mostly theoretical, as courts and water agencies have seldom cracked down on waste.[64] Modern decisions, however, have begun to take on a very different cast. The doctrine of beneficial use has always been said to prohibit waste;[65] several recent opinions have put teeth into the requirement.[66] Other courts have taken the approach that wasted water is deemed abandoned or forfeited.[67] In either case, a water user—be it a city, farm, mine, or manufacturing plant— consuming two thousand acre feet when one thousand would suffice is held to have no right to the wasted thousand: the operation is effectively forced to improve its waterworks to accommodate the lesser, although sufficient, quantity of water. As the Colorado Supreme Court, the nation's busiest water court, has explained in implementing its "maximum utilization doctrine,"[68] "there is read into every decree awarding priorities the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made, regardless of the fact that such limitation may be less than the decreed rate of diversion."[69]

Modern values have led to the alteration of water law in another

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opment projects, some of which have been used for conservation programs. *See, e.g.*, U.S. DEPARTMENT OF THE INTERIOR, U.S. DEPARTMENT OF AGRICULTURE & U.S. ENVIRONMENTAL PROTECTION AGENCY, IRRIGATION WATER USE AND MANAGEMENT 12 (1979). It follows from what I have said here that such funds should properly be allocated primarily to modernization of existing facilities, rather than to new structural approaches such as dams. One rule stifling conservation practices is the prohibition against using saved water to irrigate new lands. *E.g.*, Salt River Valley Users' Ass'n v. Kovacovich, 3 Ariz. App. 28, 411 P.2d 201 (1966). California has modified the rule legislatively. *See* CAL. WATER CODE §§ 1010-1011 (West 1985 Supp.).

[60] *See generally* CONSERVATION FOUNDATION, *supra* note 48, at 408.

[61] *Id.*

[62] Over a decade ago the National Water Commission called for reform of pricing policies. NATIONAL WATER COMMISSION, *supra* note 15, at 303-05. More recently, publications of Resources for the Future, The Conservation Foundation, and the Environmental Defense Fund have emphasized pricing. *See, e.g.*, A. KNEESE & F. LEE BROWN, *supra* note 30, at 246-47; CONSERVATION FOUNDATION, *supra* note 48, at 408-09; ENVIRONMENTAL DEFENSE FUND, TRADING CONSERVATION INVESTMENTS FOR WATER 26-28 (1983). *See also, e.g.*, Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 18-20 (1985). Gottlieb & Wiley, Wall Street Journal, Nov. 20, 1984, at 30, col. 3, make this projection:

> The environmentalists' clout is likely to increase during the next four years. They have seized the initiative on the issues of cost and subsidies, and their advocacy of such concepts as marginal cost pricing and price elasticity will continue to build support. After the Carter years, the environmentalists have rediscovered the potential for grass-roots support and have learned to work with conservatives who are truly concerned about runaway costs.

[63] *See, e.g.*, NEV. REV. STAT. § 533.460 (1979); OR. REV. STAT. §§ 540.720, 540.990(2) (1983).

[64] *See generally* Pring & Tomb, *supra* note 48 . Professor Sax has observed that, in the judicial opinions on water waste, "it is easy to be misled by the inconsistency between what the courts say and what they do." J. SAX, WATER LAW, PLANNING & POLICY— CASES & MATERIALS, 272-73 (1968).

[65] *See, e.g.*, Union Mill & Mining Co. v. Dangberg, 81 F. 73, 97 (D.Nev. 1897) ("An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. Water in this state is too scarce, needful, and precious for irrigation and other purposes, to admit of waste.")

[66] The Idaho Supreme Court has employed the beneficial use doctrine to combat the widespread use of inefficient conveyancing systems. The quantity of water to which an irrigator is entitled must be measured at the point that it enters the conveyancing system, thus requiring the irrigator to bear any loss that occurs after the water enters the system. Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 588, 494 P.2d 1029, 1032 (1972). In Wyoming, the Supreme Court refused to approve a transfer of an asserted water right that involved waste, saying that "an appropriator does not acquire a water right in water which he historically has not beneficially used." Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 569-70 (Wyo. 1978). *See also* Green River Dev. Co. v. FMC Corp., 660 P.2d 339 (Wyo. 1983). The Utah Supreme Court has also refused to recognize the longstanding waste of water as a beneficial use. *See In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679, 681-82 (1960).

Oregon cases have recognized the important principle that a diversion of a certain quantity of water may have been reasonable at the time it was originally made, but that the subsequent development of more efficient technology may, over time, require that the original quantity of water diverted be decreased in order to reduce waste. *See, e.g.*, Warner Valley Stock Co. v. Lynch, 215 Or. 523, 336 P.2d 884 (1959). California courts, enforcing a constitutional provision against "waste or unreasonable use," CAL. CONST., art. XIV, § 3, have held water users to a high standard of reasonableness. *E.g.*, Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 P.2d 889 (1967); *see also infra* notes 82-86.

[67] *See, e.g.*, State v. McLean, 62 N.M. 264, 308 P.2d 983 (1957). *See generally* Shupe, *supra* note 48, at 495-501.

[68] The maximum utilization rubric was first articulated in Fellhauer v. People, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968):

> It is implicit in these constitutional provisions [in COLO. CONST. art. XVI, § 6] that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. (emphasis in original)

The court later noted that "the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers.... Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns. [citing authority]." Alamosa-LaJara Water Users Protection Ass'n v. Gould, 674 P.2d 914, 935 (Colo. 1983).

[69] Weibert v. Rothe Bros., Inc., 200 Colo. 310, 318, 618 P.2d 1367, 1372 (1980). *See also, e.g.*, United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 855 (9th Cir. 1983), *cert. denied*, 104 S.

context, outside of the waste issue. Traditionally, water could be used only for beneficial uses, which were defined as domestic purposes and commercial uses such as agriculture, industry, mining, power generation, and stockraising.[70] In almost all cases this meant that water had to be physically diverted from the stream in order to effect a valid appropriation.[71]

Most western legislatures, however, have announced that recreation and wildlife are also beneficial uses of water. Many western states have adopted instream flow programs that leave water in the stream, unavailable for consumptive appropriation below a specified level, for fish, wildlife, recreation, and aesthetics.[72] The minimum stream-flow programs are struggling, but they surely will be gradually expanded and improved.[73] Several state water agencies have begun to take a more activist role by denying applications or imposing conditions on private water development projects in the public interest.[74]

The new directions I have discussed converge in five current, ongoing sets of developments—two in California, two in Montana, and one in Arizona—that tell us a great deal about the future of western water. The first is *National Audubon Society v. Superior Court of*

Ct. 193 (1983) ("It is settled that beneficial use expresses a dynamic concept, which is a variable according to conditions . . . and therefore over time").

[70] *See* 1 W. HUTCHINS, *supra* note 2, at 522-545.

[71] *See, e.g.*, Hardy v. Beaver County Irrigation Co., 65 Utah 28, 234 P. 524 (1924); Simons v. Inyo Cerro Gordo Mining & Power Co., 48 Cal. App. 524, 192 P. 144 (1920); Brand v. Lienkaemper, 72 Wash. 547, 130 P. 1147 (1913). In a few instances the rule was relaxed to permit an appropriation resulting from natural overflow over shallow streambanks onto irrigation fields. *See, e.g.*, *In re* Silvies River, 115 Or. 27, 237 P. 322 (1925), *modified on other grounds*, 122 Or. 47, 257 P. 693 (1927).

[72] On the recognition of recreation and other non-traditional water users as beneficial uses, see NEV. REV. STAT. § 533.030(2) (Supp. 1983); ALASKA STAT. § 46.15.080 (1982); CAL. WATER CODE § 1243 (West 1971 & Supp. 1985). *See generally* Robie, THE PUBLIC INTEREST IN WATER RIGHTS ADMINISTRATION, 23 ROCKY MTN. MIN. L. INST. 917 (1977). On instream flow programs, see generally Tarlock, *supra* note 37.

[73] Instream flow protections in eight western states are assessed in J. BAGLEY, D. LARSON & L. KAPALOSKI, ADAPTING APPROPRIATION WATER LAW TO ACCOMMODATE EQUITABLE CONSIDERATION OF INSTREAM FLOW USES (1983). The resistance by consumptive users to instream flow programs is typified by the implementation of the Oregon program. *See* Note, *Preserving Instream Flows in Oregon's Rivers and Streams* 11 ENVT'L. L. 379, 396-403 (1981). In Colorado, minimum levels have been set on 713 stream segments covering 4186.97 stream miles and on 485 lakes. Memorandum from Annie Janicki, Colorado Water Conservation Board (Mar. 5, 1985) These appropriations for instream flows, of course, are very junior rights and are inadequately enforced. The state has never made a call to protect its instream appropriations. Interview with Steven J. Shupe, Assistant Attorney General, State of Colorado (Dec. 5, 1984). Nevertheless, even junior instream rights on heavily appropriated streams can have one major impact; senior rights apparently cannot transfer their points of diversion upstream if the transfer would affect a junior instream appropriation. *See* Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954) (senior irrigation rights cannot be transferred upstream and put to a municipal use if injury would be caused to junior irrigation rights).

[74] *See generally* Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN L. INST. 917 (1977).

Alpine County[75] (the *Mono Lake* case), which in my judgment is potentially as important as any development in western resources law during the last several decades. The California Supreme Court held that diversions by the Los Angeles Department of Water and Power from the streams feeding Mono Lake were modified by the public trust doctrine. In spite of the fact that those diversions had been made earlier in the century, with great care taken to comply with both prior appropriation and riparian law, the court found that public trust rights in Mono Lake had always existed, had never been extinguished, and must be accommodated when consumptive water rights are granted. Just as it had done in water law a century and a quarter earlier in *Irwin v. Phillips*,[76] the California Supreme Court looked to current societal values, finding that "the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."[77] The court concluded that environmental factors, as well as appropriative rights, must be taken into account: "Mono Lake has long been treasured as a unique scenic, recreational and scientific resource, but continued diversions threaten to turn it into a desert wasteland."[78]

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[75] 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 104 S.Ct. 413 (1983).

[76] 5 Cal. 140 (1855), discussed *supra* text, notes 6-8.

[77] 189 Cal. Rptr. at 356; 658 P.2d at 719. The California Supreme Court had earlier recognized that private rights must comport with evolving public standards as recognized in the public trust doctrine. *See, e.g.*, Marks v. Whitney, 6 Cal.3d 251, 98 Cal. Rptr. 790, 796, 491 P.2d 374, 380 (1971):

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands. (citation omitted)

[78] 189 Cal. Rptr. at 353, 658 P.2d at 716. The fact that the perception of the California Supreme Court in 1983 is indeed an evolution from earlier perceptions of the same watercourse is exemplified by a comparison with this observation by a notable earlier visitor:

> Mono Lake lies in a lifeless, treeless, hideous desert, eight thousand feet above the level of the sea, and is guarded by mountains two thousand feet higher, whose summits are always clothed in clouds. This solemn, silent, sailless sea—this lonely tenant of the loneliest spot on earth—is little graced with the picturesque. It is an unpretending expanse of grayish water, about a hundred miles in circumference, with two islands in its center, mere upheavals of rent and scorched and blistered lava . . . . This water is not good for bruised places and abrasions of the skin. We had a valuable dog. He had raw places on him. He had more raw places on him than sound ones. He was the rawest dog I almost ever saw. He jumped overboard one day to get away from the flies. But it was bad judgment. In his condition, it would have been just as comfortable to jump into the fire. The alkali water nipped him in all the raw places simultaneously, and he struck out for the shore with considerable interest. He yelped and barked and howled as he went and by the time he got to the shore there was no bark to him—for he had barked the bark all out of his inside, and the alkali water had cleaned the bark all

This drive to place reasonable limits on private uses in order to allow the exercise of broader public trust rights is also reflected in the law of North Dakota,[79] Idaho,[80] and Montana,[81] and can be expected to influence water law directly and indirectly throughout the West. The recognition of the public trust doctrine in water law is the single strongest statement that historic uses must accommodate modern needs.

In spite of these advances, the truth is that the national environmental movement has placed issues of water quantity near the bottom of its agenda. Air and water pollution, wilderness preservation, federal forest and rangeland practices, and toxic wastes have all been given a kind of de facto priority. This is due in significant part to the tradition of state control over water allocation. Even the considerable efforts of firms such as the Environmental Defense Fund, Sierra Club Legal Defense Fund, National Wildlife Federation, and National Audubon Society have only scratched the surface considering the thousands of major water decisions, made by state water agencies in the nineteen western states, that go uncontested every year. My expectation is that the national groups are likely to conclude that water quantity issues must in substantial part be treated as state issues and that environmental organizations will establish water advocacy firms for each western state, or perhaps for each two- or three-state region. Only in this way can state water agencies be monitored effectively.

In short, this country has yet to establish an ethic for water quantity, as the nation has done for land, air, trees, some animals, and, ironically, even water quality. Nevertheless, our rivers and lakes, and the creatures that depend on them, touch deep and profound chords in our society. Diverse movements in the law reflect those values. A

water quantity ethic is fast developing, and an even broader "watershed ethic," integrating all of the values of natural systems and best management practices, will also eventually command public acceptance. It is shortsighted for any group concerned with water policy to underestimate the growing force of these changing perceptions. That is the ultimate lesson of the *Mono Lake* case.

The second event in California came to a head in June, 1984 when the State Water Control Board issued an order entitled "Decision Regarding Misuse of Water By Imperial Irrigation District."[82] The district, located in southeastern California, is the largest user of Colorado River water, having diverted in recent years about 2.9 million acre feet annually of the roughly fourteen million acre feet produced by the river each year.[83] California has been receiving as much as 5.4 million acre feet annually from the Colorado but that must drop to 4.4 million acre feet, plus one-half of any surplus among the lower basin states, when the Central Arizona Project goes on line.[84]

The Control Board ruled that the Imperial Irrigation District has been violating California constitutional and statutory prohibitions against waste and unreasonable use of water by allowing more than one million acre feet, a thirty-eight percent loss, to enter the Salton Sea as return flow.[85] This water was unavailable to other parties, including the Metropolitan Water District, who might otherwise use this part of California's Colorado River entitlement. In this comprehensive ruling, the Board ordered the Imperial Irrigation District to submit a detailed plan for control of excessive leach and tail water, canal seepage, and canal spills. The Board also ordered the development of a rigorous water accounting and monitoring procedure to quantify actual water deliveries and system losses.[86]

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off his outside, and he probably wished he had never embarked in any such enterprise. He ran round and round in a circle, and pawed the earth and clawed the air, and did three double somersaults, sometimes backward and sometimes forward, in the most extraordinary manner. He was not a demonstrative dog, as a general thing, but rather of a grave and serious turn of mind, and I never saw him take so much interest in anything before. He finally struck out over the mountains, at a gait which we estimated at about two hundred and fifty miles an hour, and he is going yet. This was about nine years ago. We look for what is left of him along here every day.

M. TWAIN, ROUGHING IT 265-67 (1872).

[79] United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976).

[80] Kootenai Envt'l Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983). The Idaho Supreme Court expressly found that the California rule applies in Idaho. *Id.* at 1094.

[81] Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984); Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984). For a current assessment of the public trust doctrine in water law, *see* Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MTN. MIN. L. INST. 17 (1985).

[82] *In re* Alleged Waste and Unreasonable Use of Water by Imperial Irrigation District, Decision
1600 California Water Resources Control Board (1984) [hereinafter cited as Control Board decision].
The Administrative proceedings are discussed in parallel litigation, Elmore v. Imperial Irrigation Dist.
159 Cal. App.3d 185, 205 Cal. Rptr. 433 (1984).

[83] Control Board decision, *supra* note 82, at 7.

[84] Arizona v. California, 373 U.S. 546, 575-90 (1963).

[85] Control Board decision, *supra* note 82, at 7. The provision in the California Constitution is
art. XIV, § 3. *See also* CAL. WATER CODE §§ 100, 275 (West 1971 & Supp. 1985).

The Imperial Irrigation District has chal-
[86] Control Board Decision, *supra* note 82, at 67-71. The Imperial Irrigation District has chal-
lenged the Control Board's order in court. On March 28, 1985, a state trial judge ruled in a brief
opinion that the Control Board had authority to investigate, conduct an administrative hearing, make
findings on reasonable use, and issue an order of compliance, but that the Control Board was required
to institute a court action, with the reasonable use issue to be tried de novo, if the District refused to
comply with the Board's administrative order. Imperial Irrigation District v. State Water Resources
Control Board, No. 58706 (Cal. Super. Ct., Imperial County, Mar. 28, 1985). The State plans to appeal
the order. Interview with M. Anne Jenning, Deputy Attorney General, State of California (May 1,
1985).

The ramifications of the trial court's ruling are unclear. The District already has complied with

Another set of recent developments involves the work of the Montana Legislature in spring, 1985, when it adopted two measures, one infusing a range of public interest notions into the state's water code and the other ratifying an Indian water rights settlement. The innovative public-interest legislation, H.B. 680,[87] has four major features. It provides for the comprehensive application of public interest criteria for initial permit applications and for changes in appropriative rights,[88] with the criteria being especially rigorous for diversions in excess of 4000 acre feet.[89] The 1985 Act flatly prohibits private appropriations for transport out of specified basins or for any consumptive use in excess of 4000 acre feet; for those categories, only the Department of Natural Resources and Conservation may make appropriations.[90] The Act conditions out-of-state transport of water.[91] Finally,

H.B. 680 institutes a limited water leasing program.[92] The only way in which a private user can transport water out of the specified basins or obtain rights to consume in excess of 4000 acre feet is to lease the water from the Department.[93] The water leasing program is modest in several respects, among them the fact that the 4000-acre-feet-consumptive limit on appropriations is high enough that it will apply only to extremely large projects.[94] Nevertheless, the 1985 Act offers several valuable concepts in its broad-based imposition of public rights, and its break with traditional laissez-faire prior appropriation law.

In 1985, the Montana Legislature also approved a water rights compact between the state and the Assiniboine and Sioux Tribes of the Fort Peck Reservation.[95] There have been two other settlements of Indian water rights in recent years,[96] but the Fort Peck-Montana Compact is noteworthy because it is due in part to the Montana Reserved Water Rights Compact Commission (Compact Commission),[97] the only attempt by a state to institutionalize water rights negotiations with Indian tribes. The Compact Commission process has moved haltingly—of the seven Montana tribes, the Blackfeet have so far refused to participate and a 1983 Fort Peck-Montana Compact was tentatively agreed to by the negotiators, but the Compact Commission never submitted it to the legislature for ratification.[98] Nevertheless, the ratification of the renegotiated 1985 Fort Peck-Montana Compact seems to offer preliminary validation of Montana's compact-negotiation approach.

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many aspects of the Control Board's order. Interview with Robert W. Miller, California Department of Water Resources (Apr. 24, 1985). The political climate in Imperial Valley is much more favorable toward conservation measures and it may be unnecessary for the State to go to court to enforce the administrative order. Jennings interview, *supra* this note. Even if the trial court is correct in finding that the District is entitled to a de novo judicial hearing on reasonable use before the Control Board can enforce its order, the reasoning may be inapplicable to most other water users in California. The District possesses pre-1914 rights that have not yet been adjudicated under state law. The trial court's ruling may well not apply to appropriations made after the passage of the California's Water Commission Act of 1913 (which took effect in 1914) or to pre-1914 rights adjudicated under the 1913 Act; the Control Board's authority to issue enforceable orders concerning water waste with regard to permits issued pursuant to the 1913 Act appears to be much more clearly stated. CAL. WATER CODE §§ 1825-51 (West Supp. 1985). In any event, the Control Board is continuing to investigate misuse of water in the state and to enforce the constitutional and statutory prohibitions against waste. Jennings interview, *supra* this note.

[87] H.B. 680, 49th Leg., 1985 Mont. Laws— [hereinafter cited as H.B. 680]. The legislation closely follows legislation recommended by the Select Committee on Water Marketing. The initative, and relevant Montana water law, are examined in Final Report of the Select Committee on Water Marketing. SELECT COMMITTEE ON WATER MARKETING, FINAL REPORT TO THE 49TH MONT. LEG. (Jan. 1985) (copies available from Environmental Quality Council, State Capital, Helena, Montana 59620) [hereinafter cited as SELECT COMMITTEE REPORT].

[88] *See* H.B. 680, *supra* note 87, § 4 (criteria for issuance of permit; to be codified at MONT. CODE ANN. § 85-2-311); *id.*, § 7 (changes in appropriation rights; to be codified at MONT. CODE ANN. § 85-2-402). The change in use provision applies to changes in the place of diversion, the place of use, the purpose of use, or the place of storage. *Id.* § 1(5).

[89] For such diversions, the applicant must show by clear and convincing evidence that the proposed application is a "reasonable use" which requires consideration of, among other things, minimum stream flows for existing water rights and aquatic life; the effects on water quality; and the creation of, or contribution to, saline seep. *Id.* § 4(2). The Department must examine the proposal to determine the existence of significant adverse environmental impacts, thus triggering an environmental assessment. *Id.* § 4(2)(e)(vi). These public interest provisions expand and replace MONT. CODE ANN. § 85-2-311, a temporary two-year measure enacted in 1983. The more onerous "level 2" public interest provisions described here will apply to a limited number of applications; only 56 of 8000 permit applications between 1973 and 1985 were for diversions exceeding 4000 acre feet. SELECT COMMITTEE REPORT, *supra* note 87, at VI-4.

[90] H.B. 680, *supra* note 87, § 3 (to be codified at MONT. CODE ANN. § 85-2-301). The designated basins are the following, including their tributaries: the Clark Fork River, the Kootenai River, the St. Mary River, the Little Missouri River, the Yellowstone River, and the Missouri River to its confluence with the Yellowstone. *Id.* § 3(2)(a)(i).

[91] *See, e.g.*, H.B. 680, *supra* note 87, § 4(3)(b) (issuance of permits for appropriation and transportation out-of-state), § 7(5) (changes in appropriation rights for the withdrawal and transportation of appropriated groundwater for use outside the state). On interstate transporting of water, *see supra* note 37.

[92] *See* H.B. 680, *supra* note 87, § 13. The program is described in SELECT COMMITTEE REPORT, *supra* note 87, at VI-9 to -12.

[93] H.B. 680, *supra* note 87, § 3(2)(b).

[94] Only two Montana agricultural appropriators applied for consumptive rights in excess of 4000 acre feet per year between 1973 and 1985. SELECT COMMITTEE REPORT, *supra* note 87, at VI-10 to -11. The coverage for the leasing program is narrower than for the "level 2" public interest criteria, *see supra* note 89, because the floor for leasing is 4000 acre feet consumptive while the floor for the "level 2" public interest criteria is 4000 diverted.

[95] State of Montana/Assiniboine and Sioux Tribes of Fort Peck Indian Reservation Compact, *ratified in* S.B. 467, 49th Leg. 1985 Mont. Laws — (quantifying reserved water rights of Assiniboin and Sioux Tribes of Fort Peck Indian Reservation and providing guarantees for the water rights of certain non-Indians living in water basins within or adjacent to the Reservation boundaries).

[96] Pub. L. No. 95-328, 92 Stat. 409 (1978), as modified by Pub. L. No. 98-530, 98 Stat. 2698 (1984) (Ak Chin Indian Community of Arizona); Pub. L. No. 97-293, Title III, 96 Stat. 1274 (1982) (San Xavier Papago Reservation of Arizona).

[97] MONT. CODE ANN. § 2-15-212 (1983).

[98] SELECT COMMITTEE REPORT, *supra* note 87, at IV-16 to -17.

Some tribes oppose any present quantification of their future-looking reserved rights and are opposed to negotiations. Others, however, believe that the parties can tailor an individualized resolution better than can a judge and that under the right circumstances the certainty inherent in a negotiated settlement can be preferable to the protracted litigation required to adjudicate these enormously complex disputes. It may be that the Fort Peck-Montana Compact of 1985 and the Compact Commission process offer a glimpse of the future on these sensitive and far-reaching issues.

The final recent event is the first level of fruition of the 1980 Arizona Groundwater Management Act,[99] the most far-reaching statutory water conservation program ever adopted by any state. In December, 1984, the Director of the Department of Water Resources issued the first management plans for active management areas (AMAs).[100] These plans are the primary implementation mechanisms for the 1980 Act, the product of a fascinating struggle and reconciliation among the mining industry, irrigators, municipalities, the Department of the Interior, Arizona Governor Bruce Babbitt, and the relentless mandate issued by the state's aridity.[101]

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[99] ARIZ. REV. STAT. ANN. §§ 45-401 to -637 (Supp. 1984-85). *See generally* Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U. COLO. L. REV. 471 (1982); Higdon & Thompson, *The 1980 Arizona Groundwater Management Code*, 1980 ARIZ. ST. L.J. 621.

[100] *See, e.g.*, ARIZONA DEP'T OF WATER RESOURCES, MANAGEMENT PLAN, FIRST MANAGEMENT PERIOD: 1980-1990 (1984) [hereinafter cited as Phoenix AMA (Active Management Area) Management Plan]. Management Plans were also issued in December, 1984, for the Prescott and Tucson Active Management Areas. The 1980 Act established four initial AMAs, ARIZ. REV. STAT. ANN. § 45-411 (Supp. 1984-85), which included about 80% of Arizona's population, 70% of the state's groundwater overdraft, and 60% of the groundwater pumping. K. Ferris, *The Development of the New Arizona Groundwater Code* (Oct. 30, 1984) (to be published in 1985 in the proceedings of a groundwater symposium entitled "Groundwater, Crisis or Opportunity," sponsored by the Univ. of Texas at Austin and Texas A & M Univ. during Oct. 29-31, 1984; and also excerpted from GROUNDWATER MANAGEMENT: A KEY ISSUE FOR THE 80's (T. James & S. Ballard eds.), soon to be published) [hereinafter cited as Ferris]. The Director of Water Resources must develop a series of five successive management plans for each AMA through the year 2025, when groundwater withdrawals may not exceed discharge; the conservation requirements will become more rigorous in each successive plan. ARIZ. REV. STAT. ANN. §§ 45-561 to -566 (Supp. 1984-85). The initial plans, cited above, cover the management period ending in 1990.

[101] The history of the 1980 Act is told well in Connall, *A History of the Arizona Groundwater Management Act*, 1982 ARIZ. ST. L.J. 313. The state established a Groundwater Study Commission in 1977 to address the increasingly serious overdraft situation, *id.* at 323, but the long-simmering tensions among the various interest groups made progress difficult. For example, Jim Bush, the colorful Phoenix attorney representing mining interests, laid the blame for the overdraft condition at the irrigators' feet and fought against potential profits to the farmers if agricultural land were to be retired: "We're not going to buy farms so that the farmers can move to La Jolla and raise martinis." *Id.* at 325. Connall has extolled Governor Babbitt's abilities to grasp the difficult factual and legal issues and to move the negotiators toward consensus. *Id.* at 331-32. A key impetus was Interior Secretary Cecil Andrus's personal visit to Phoenix and his insistence that the Department would allocate no Central Arizona

The central provisions of the Act and the recent management plans are a blueprint for serious conservation of western water.[102] Among many other things, The Act provides for a strong state regulatory agency;[103] the imposition of mandatory water duties for individual farm units based upon specified conservation practices;[104] a prohibition against opening new irrigated acres within the AMAs;[105] a program for retiring land from irrigation;[106] compulsory conservation

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Project (CAP) water unless the state enacted an effective groundwater code. *Id.* at 329-30. Andrus was satisfied with the 1980 Act and CAP water was not delayed. *Id.* at 344.

[102] The Act was challenged on constitutional grounds on the theory that existing Arizona law provided for ownership of groundwater by overlying landowners and that the restrictive provisions of the code constituted a taking. State and federal courts have both upheld the Act. *See* Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982); Cherry v. Steiner, 543 F. Supp. 1270 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1719 (1984). The Arizona Supreme Court dismissed language in earlier opinions ("dictum thrice repeated is still dictum," 638 P.2d at 1327), and held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply. . . ." *Id.* at 1328.

[103] The negotiators in conservative Arizona finally settled on the creation of a new agency, the Department of Water Resources, with broad-based powers to implement the Act. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-102 (Supp. 1984-85). *See generally* Kyl, *supra* note 99, at 483-84. Ferris has explained some of the reasons:

> The concept of concentrating decision-making authority at the state level was not accepted without controversy. In its 1979 Draft Report, the Groundwater Management Study Commission recommended that management of groundwater should be carried out primarily by local management entities according to statewide statutory guidelines with the State exercising oversight and enforcement powers.
>
> The negotiators, however, ultimately recommended that the Commission reject giving local management entities decision-making authority. Agricultural representatives had begun to fear that municipalities would control any election for members of a local management entity and that management by local entities would therefore mean management by the cities. Other representatives, most notably mining, had always worried that members of the local management entities would be unable to withstand political pressure from their neighbors and that management by a local entity would therefore mean no management. Finally, several negotiators became increasingly concerned that each local management entity might interpret a complex law differently resulting in strikingly divergent management plans for each AMA and numerous legal challenges. Gradually the consensus shifted toward centralized state management with AMAs as the focal point of management activity.

Ferris, *supra* note 100, at 10-11.

[104] In each management plan, a water duty is calculated for each farm unit (one farm or contiguous farms with similar soils and cropping patterns). For the first management plans, the calculations assume the use of conservation practices such as lined canals and land levelling. *See, e.g.*, Phoenix AMA Management Plan, *supra* note 100, at 39-60, 130-35. Later plans will be based on more advanced practices such as drip irrigation. After a phase-in period (January 1, 1987 for the initial plans), an irrigator may not apply water in excess of the prescribed duty. *See* ARIZ. REV. STAT. ANN. §§ 45-561 to -566 (Supp. 1984-85), and Ferris, *supra* note 100, at 15-16.

[105] No water, including CAP water, may be used to irrigate land that had not been in production as of January 1, 1980. ARIZ. REV. STAT. ANN. § 45-452 (Supp. 1984-85). Existing irrigation rights are grandfathered and can be transferred. *Id.* §§ 45-472 to -474. On the different classes of rights recognized by the Act, *see* Kyl, *supra* note 99, at 484-91.

[106] ARIZ. REV. STAT. ANN. § 45-566 (Supp. 1984-85). Once retired, land cannot be returned to irrigation. *Id.* § 45-473.

within metropolitan residential areas;[107] and the imposition of "ground water withdrawal fees" (a politically necessary euphemism for pump taxes).[108]

The 1980 Act does not go as far as some would wish; for example, it encourages, but does not actually set, limits on pumpage. Nevertheless, by any reasonable standard it is a remarkable piece of legislation. It foreshadows in bright terms the possibilities for effective combat against waste and overuse.

The judicial and legislative recognition of public environmental rights, illustrated by the *Mono Lake* case and the work of the 1985 Montana Legislature; the crackdown on waste, exemplified by the Imperial Valley decision; the willingness to settle long-simmering disputes over Indian water rights, evidenced by the Fort Peck-Montana Compact; and the campaign against overuse, demonstrated by the Arizona Groundwater Code, are all in their infancy. Regardless of what they may say, many courts and most administrators are still reluctant to order the hard measures necessary to achieve the goals of conservation and environmental protection. But these developments are accelerating and will continue apace. Further, in ways I will now explain, they have major ramifications for the central issue of the years to come, which is to reach a fair accommodation between the traditional uses favored by the prior appropriation doctrine and the new uses recognized by contemporary society.

The decisions against waste and in favor of public rights operate from an unspoken, but critical, premise—a notion, expounded upon by Professor Joseph Sax and others, that underlies recent cases in the field of land use. These decisions have upheld legislation allowing restrictive zoning, setting height limits on buildings, and prohibiting practices such as landfills, and have required public access to areas

such as dry sand beaches.[109] All of those results cut deeply into traditional prerogatives of private owners of land. They are incursions on the basic form of land ownership, the fee simple absolute, traditionally considered a guarantee of total ownership.

We now learn that the term "fee simple absolute" is a misnomer. Private property rights are always defined by public authority in the first instance, and private land has always been subject to public rights: regulatory prerogatives in fulfillment of the police power and property rights in the form of the public trust doctrine. The public rights may have laid inchoate, but they existed from the moment any owner received a deed, so there is no taking of a property interest when the public rights are exercised to limit the use of land.

These limitations on the ownership of land apply directly to property rights in water. Appropriative rights are not as absolute as they have been assumed to be. In all states they are subject to the prohibition against waste. If a user is applying too much water, there is only a privilege, not a right, in the wasted water and the state may require a lower duty of water based on the governmental power to regulate for the general welfare. Many states will be prepared to enforce an implied condition under the public trust doctrine that major environmental resources cannot be substantially impaired. Further, decreed rights are impliedly subject to obligations to other states, nations, and Indian tribes.

The fact that state-granted water rights, even if decreed, are not as fixed and hard as commonly believed is critical in this transition period of water law. Water now diverted but wasted can be freed up for other uses. Judges have long been solicitous of existing water uses but there is an increasing recognition that there are few equities in poor water practices. On so-called overappropriated rivers, where there is supposedly no water available for new uses, an accommodation can almost always be made if existing users adopt good conservation techniques.[110] This is likely to be a primary method by which present uses can be reconciled with demands for water for energy, instream uses, and Indian tribes.[111]

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[107] Residential users are subjected to per capita reductions. *Id.* § 45-564(A)(2). The initial management plans, *supra* note 100, are based on reasonable use of 140 gallons per day per capita. Tucson has come close to that figure through its highly successful "Beat the Peak" program, but use in Phoenix still exceeds 250 gallons per day. Ferris, *supra* note 100, at 16-17. Existing supplies of municipal water are not required to meet the 140 gallon per day limit but must reduce per capita deliveries by 6-11% within two years. New municipal providers must meet the 140 gallon per day standard. *See* Phoenix AMA Management Plan, *supra* note 100, at 61-81. *See also* Rocky Mountain Mineral Law Foundation, Water Law Newsletter No. 3 at 1-2 (1984).

[108] ARIZ. REV. STAT. ANN. § 45-611 (Supp. 1984-85). The Director has set a fee of $0.75 per acre foot for calendar year 1985, which will be applied toward the annual administrative costs of approximately $1.5 million. Ferris, *supra* note 100, at 20. No more than $1 per acre foot may be used to defray administrative costs, but during the second ten-year plan an additional $2 fee can be levied to create a fund for augmenting the water supply. ARIZ. REV. STAT. ANN. § 45-611(2) (Supp. 1984-85). During the third planning period another $2 fee can be imposed and applied toward the retirement of agricultural land. *Id.* § 45-611(3).

[109] *See* Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). Leading cases include Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984); National Audubon Soc'y v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983), discussed *supra* text at notes 75-78, and Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). These concepts are discussed in the context of groundwater regulation in Kelly, *Management of Groundwater through Mandatory Conservation*, 61 DEN. L.J. 1, 17-34 (1983).

[110] Of course, water scarcity is not alleviated if conserved water is appropriated and consumptively used by development interests. As Professor Helen Ingram has put it, "Conservation should not be regarded as an end in itself, but rather as a means to achieve some aim. . . ." (as quoted in Udall, *The Tucson Paradox*, 87 AUDUBON 98, 99 (Jan. 1985)). *See also* the "conserve and reallocate" theory

In conclusion, then, we are finally assessing the value of the prior appropriation system, bred in the mid-nineteenth century, to the modern American West. To be sure, some components of the doctrine have enduring worth. The West could not have been settled, and would be in a significant measure of disarray today, if rights to the essential resource could not be charted with reasonable certainty. Justice Rehnquist's analogy between land titles and water titles is not inapt.[112]

But other elements of the prior appropriation system are failures in these times. The doctrine breeds wastefulness on a number of counts; the basic assurance of certainty has too often been twisted into a guarantee to use whatever amount of water was diverted by outmoded systems in a long-ago era of relative plenty. The "use it or lose it" mentality, fueled in part by court decisions awarding priorities among states according to first diversion,[113] creates a rush among states on interstate rivers to dam up the West's deep canyons in order to capture water and thereby preserve consumptive rights. Prior appropriation takes aim at the main hope of struggling Indian tribes. If unchecked, it can be the death knell for the streams that it draws dry. Western water law, often hailed as a laissez-faire, market-oriented system, in fact is riddled with federal subsidies, restrictions against alienation, and preferences for inefficient uses; to the extent that the market does operate, prior appropriation is a reminder that the market traditionally has been ineffectual in protecting minorities and the environment.

The ultimate problem, of course, is that the old doctrine forces us to proceed today according to the values of a century and a quarter ago. The promising young shoots in this time of transition all are nurtured by our determination to decide by contemporary standards, not those of a distant time.

We are, then, in the process of altering our essential ways of thinking about western water. This reconceptualization is reflected in common terminology. Phrases like "water organization" and "water user" have traditionally held narrow meanings. Perhaps we are near the point where we fully recognize that water organizations include not only the Salt River Project and the Denver Water Board but also the Wilderness Society and the Navajo Tribe. We count as water users not just a hard-working farmer and a coal-fired plant but also a rafter, a trout fisherman, and even an artist on the bank of a mountain stream. As these notions incrementally become embedded in the court opinions and the statutes, we push on toward a legal structure that fairly reflects the diversity and richness of the modern American West.

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set out in Weatherford, *supra* note 48. If instream flow programs are put in place, then relatively junior public rights will become more senior as water becomes available when older uses become more efficient. Further, states probably have the authority to pass legislation providing that saved or abandoned water reverts to state control, rather than being available to junior users by what one of my colleagues calls "primogeniture." Such legislation, while it admittedly limits the ability of juniors to move up in the system of priority, would probably be considered a permissible regulation rather than a taking of a vested right. *See supra* notes 66-69, 109 and accompanying text. In this manner, saved and abandoned water would be made available for allocation by the states according to contemporary demands.

[111] This is a two-edged sword for Indian tribes. They, too, will have to continue, or adopt, good water practices. The law of waste will be applied to Indian rights just as surely as it will be to state-created rights. Thus tribal planning must take into account additional expenses for conservation.

[112] Arizona v. California, 460 U.S. 605, 620 (1983).

[113] *See, e.g.*, Colorado v. New Mexico, 104 S. Ct. 2433 (1984); Nebraska v. Wyoming, 325 U.S. 589 (1945).

Senator Inouye, Senator Bradley, Committee members, I appreciate the invitation to testify on important issues in Indian water policy. My name is David H. Getches and my interest and involvement in the subject of these hearings spans the past twenty years. During that time I have written, spoken, litigated and negotiated about Indian water. I have represented tribes as an attorney and recently, as a state official, I have represented the interests of the State of Colorado.

My experience includes serving as an attorney in many cases on behalf of Indians and Indian tribes. I began working in Indian law in 1969 as co-directing attorney for the Escondido office of California Indian Legal Services (CILS). Later I became the Founding Director of Native American Rights Fund in Boulder, Colorado. I participated in the preparation and litigation of many water cases in both of those positions, including the San Luis Rey and Pyramid Lake cases.

In 1979 I became a law professor at the University of Colorado teaching courses in American Indian Law and Water Law. I have authored books on these subjects including Cases and Materials on Federal Indian Law (with Wilkinson), Water Law in a Nutshell, and Water Resource Management (with Meyers, Tarlock and Corbridge). Some of my recent articles in these areas are: "Management and Marketing of Indian Water: From Conflict to Pragmatism," 58 Colo. L.Rev. 515 (1988); "Comprehensive Water Planning: Untapped Opportunity for the West," 9 J. Energy L. & Pol. 1 (1988); "Water Use Efficiency: The Value of Water in the West," 8 Pub. Land L. Rev. 1 (1988); "Competing Demands for the Colorado River," 56 Colo. L.Rev. 413 (1985); "Controlling Groundwater Use and Quality: A Fragmented System," 17 Natural Resources Law. 623 (1985); "Water Rights on Indian Allotments," 26 S.D.L.Rev. 405 (1981). I also give speeches frequently on Indian law and western water rights.

In 1983 I was appointed Executive Director of the Colorado Department of Natural Resources by Governor Richard D. Lamm. I held that position until 1987. The Department has responsibility for ten divisions of state government including two water agencies, the Division of Water Resources (which houses the Office of the State Engineer) and the Colorado Water Conservation Board. My job included dealing with major water policy issues on behalf of the state. I was a member of the Colorado Water Conservation Board, Colorado Ground Water Commission, Colorado Commission of Indian Affairs, and several other state boards and commissions. In addition I represented the state on the Colorado River Basin Salinity Control Forum and the Western States Water Council.

During my tenure as Executive Director of the Colorado Department of Natural Resources we initiated negotiations to resolve litigation that had been pending for many years to quantify the reserved water rights of the Southern Ute and Ute Mountain Ute Indian Tribes. After nearly two years of negotiation we executed a Final Settlement Agreement among the two tribes, the state, local water users and the United States. This agreement became the basis for the Act of Congress passed last year settling the tribal claims.

My work in Indian water rights issues, especially as a state official attempting to resolve Indian claims, gives me some perspectives that I would like to share with the committee. There are several problems in how the Executive has approached these negotiations. In addition, I think that there are some common elements that emerge from each of the three Indian water rights settlements that Congress enacted last year that indicate possible elements for inclusion in future negotiated settlements. Finally, I advocate more liberal provision for Indian water marketing in future settlements in order to put them on an equal footing with holders of other western water rights. It is vitally important that resolution of Indian water issues be made in the modern context of western water management -- a context of wise and efficient use of a scarce resource.

Litigation of Indian Reserved Rights -- A Blunt Instrument

The 1908 Winters decision[1] announced that Indian tribes have unspecified quantities of water rights reserved for their benefit on streams throughout the West. These rights carry with them an early priority date -- the date the reservation was set aside. The Supreme Court's ruling went largely unnoticed for many years, but as settlers grew dependent on waters where the Indians' theoretical rights existed they occasionally became uneasy about the prospect that the tribes' inchoate rights, senior to their own, might be exercised.[2] Everyone whose state water rights were perfected after the reservation was established had rights inferior to the tribes.

The uncertainties caused by the indeterminate nature of Indian reserved water rights could only be cured by definitely quantifying them. The Winters decision said only that the Indians had rights to sufficient water to fulfill the purposes of the reservation. Finally, in 1963, the Court explained that reserved rights quantifications were to be based on an examination of the purposes of creating the particular reservation and determining how much water it would take to carry out those purposes. In the case of the five reservations along the Colorado River the purpose of setting aside the lands was to make it possible for the Indians to farm. Thus, the Court said that quantification of water rights should be based on the amount of water needed to irrigate all of the "practicably irrigable acreage" on the reservation.

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[1] Winters v. United States, 207 U.S. 564 (1908).

[2] The Public Land Law Review Commission found that "the uncertainty generated by the [reserved rights] doctrine is an impediment to sound planning for future resources development." Public Land Law Review Commission, One Third of the Nation's Land 144 (1970).

In addition to a standard, states and non-Indian water users needed access to a forum competent to make the determination that would mesh with the system of state water rights. Ordinarily western states have provisions for adjudicating all the water rights in a stream system in a single court proceeding. But the United States was able to avoid subjecting its reserved water rights to determination in these suits by asserting a lack of state court jurisdiction and federal sovereign immunity. Congress cleared the way for adjudication of reserved rights in state general stream adjudications with the passage of the McCarran Amendment in 1952.[3] After years of litigation over the proper meaning of the provision it is now clear that the United States may be joined in state courts where they must claim both federal and Indian reserved water rights.[4]

Indian water rights adjudications have been initiated in virtually every western state pursuant to the McCarran Amendment. Millions of dollars in state, federal, tribal and private funds have been spent on the costs of litigation. Only one Indian reserved rights case has reached a final decision in the highest court of a western state. Wyoming's Big Horn adjudication, the result of 11 years of litigation, quantifies the reserved water rights of the Shoshone and Arapaho Tribes of the Wind River Indian Reservation.[5] The United States Supreme Court has granted certiorari to review the decision. Should the Court reverse the decision, the case is destined for more years of litigation. Should the Court affirm, there will be years of negotiation and litigation over the interpretation and implementation of the decision.

The search for certainty through quantification litigation is long, expensive and not always satisfactory. A tribe may end up holding impressive paper water rights but without the means to develop or use water. The uncertainty of the state and of non-Indian water users about the size of the threat to their junior water rights may be resolved, but not the uncertainty about whether or when the quantified rights might be exercised. The court decision is not likely to solve their practical need for reliable water supplies. Hostilities between Indians and non-Indians also may be exacerbated by the heat and vigor of litigation.

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[3] 43 U.S.C. §666.

[4] Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); United States v. District Court for Water Division No. 5, 401 U.S. 527 (1971); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

[5] Wyoming v. United States, 753 P.2d 76 (Wyo. 1988).

At best, litigation is a starting point for sharpening the issues and articulating the positions of the parties so that they can negotiate a meaningful, practical resolution that provides the Indians with deliverable water and non-Indians with genuine certainty. Nearly all the successful Indian water rights settlements that have been reached began with litigation. A genuine resolution of some 50 pending lawsuits will ultimately depend on negotiations.

The Federal Trustee and Negotiated Settlements

Negotiation of Indian reserved rights is far preferable to litigation. Solutions to the actual and anticipated problems of water users, Indian and non-Indian, can be worked out and made compatible with state water allocation systems.

If the purpose of quantifying Indian claims to water is to do justice to American Indian tribes whose reservation economies have often languished for lack of water, more than a judicial announcement of their water rights is needed. Non-Indians who settled in the vicinity of Indian reservations, many induced by the federal government's homesteading or reclamation programs, ought to be treated fairly, too. They should not be expected to bear all the consequences when Indians finally begin to make use of recently vindicated water rights.

The United States has a well-recognized trustee relationship with Indian tribes. Indians legitimately look to the federal government for protection and assertion of their rights. In an apparent acknowledgment of its obligation to give meaning to the tribes' water rights the past several Administrations, speaking with varying degrees of conviction, have paid lip service to the concept of negotiated Indian water rights settlements. The wisdom of the idea is that it can result in "wet water" for Indians, not just a legal decree. And it provides an opportunity for accommodations to be made that allow non-Indian uses to continue. Often facilities for storage or delivery can serve both Indians and non-Indians, allowing fulfillment of Indian rights without substantial dislocations of non-Indian users.

The federal trustee has proved to be notoriously unreliable in negotiations. The Departments of Interior and Justice typically encourage negotiated resolutions of water disputes.

But their proclaimed policy favoring settlements has a hollow ring in light of recent experience. Federal representatives will attend negotiating sessions but their authority and interest are both severely limited. Their role did not resemble that of a fiduciary whose paramount interest is in furthering Indian rights and well-being.

Our own experience with the negotiation of the Colorado-Ute Indian (Animas-La Plata) settlement is apparently typical of the experiences of others involved in the San Luis Rey and Salt River Pima-Maricopa settlements. Large numbers of federal representatives were sent to early negotiating sessions. It soon became obvious that the state, the tribes and the local water users were making constructive progress, but that the United States representatives were either noncommittal, claiming that they lacked authority, or negative in their reactions to nearly every proposal. Federal positions were inconsistent, the authority of "negotiators" was always in doubt and their instructions changed from session to session.

There was considerable disagreement among negotiators from the Bureau of Reclamation, the Bureau of Indian Affairs, the Secretary's office, the Solicitor's office, the Interior Office of Policy Analysis, the Office of Management and Budget (OMB), the Justice Department and others. The only definite position we could count on was one that was approved by OMB. The cast of characters changed frequently, too, with anyone who became especially creative or helpful being reined in or reassigned.

The government's role in recent negotiations has been more as a trustee for the federal treasury than for the Indian tribes. The rare zeal we observed in the Colorado-Ute negotiations was for ensuring that non-federal entities paid a large share of the costs (which these entities expected to and did agree to pay).

One of the few official positions announced with any clarity was that the Administration considered its obligation to protect Indian water rights to be limited to litigation. That is, the trustee disclaimed any responsibility for the economic, social, cultural and political implications of prolonged denial of effective access to tribal water resources. Thus, the trustee's obligation does not include participating in the burdens of making Indian water rights useful and productive. That much was explicit. Implicit was the notion that current budgets could tolerate only the cost of litigation; the inevitably higher costs of fulfilling the Indian trust in a way that allowed productive use of water rights (without undue hardship on established non-Indian appropriators) would be the fiscal headache of some future Administration.

One would have expected that the federal participants would at least be helpful in advising and supporting their nominal beneficiaries, the tribes. But the tribes were the first to suggest fairly early in the process that the federal representatives not be invited to a series of negotiating sessions. From a state perspective, we welcomed a unified, well-informed position from our adversaries. The federal presence, however, generally detracted from the tribes' strategy and our ability to respond to them.

The Departments of Interior and Justice ultimately signed the agreement that was negotiated. A few particularly effective and committed individuals within those departments deserve credit for pulling the Administration together for the precarious finale of the negotiations. Congressional interest and pressure was also indispensable. The Administration was little help once the settlement reached Congress, however. The tribes and other parties were on their own throughout most of the difficult legislative process.

Congress and the Ingredients of Successful Indian Water Settlements

To its credit, the last Congress passed several progressive settlement bills. The San Luis Rey, Salt River Pima-Maricopa and Colorado-Ute Indian (Animas-La Plata) settlements each deals with different circumstances and each was negotiated independently. Neither the federal government nor tribes acting collectively have developed a policy or strategy for such negotiations. Yet each settlement contains a strikingly similar package of important elements. It is instructive to look at these similarities as possible ingredients of future settlements.

The common elements are:

- a federal investment in water development facilities or acquisition of water that enables the tribes to put their water to use without infringement on established non-Indian uses.
- significant non-federal cost-sharing
- creation of substantial Indian trust funds from federal and non-federal monies, to be used as the tribes determine
- limitations on off-reservation water marketing

These four elements achieved the goals of successful negotiated dispute resolution. They gave the parties certainty. They left everyone about as well-off as they could have expected to be if their litigation position had succeeded. The outcome in each case is generally considered to be fair.

Success was possible because Congress was willing to contribute funds that exceeded the estimated cost of litigation (though not by much). This contribution recognizes a trust relationship broader than a duty to engage in pro forma defense of legal rights. And it incorporates a policy of equity toward non-Indian water users. Simply stated, federal financial participation is critical to the negotiation of fair, balanced negotiated Indian water rights settlements that fulfill the federal-tribal trust relationship.

The approach of the 100th Congress can be criticized, however.

1. It failed to make a definite commitment of all the funds necessary to implement the settlements. Congress has acknowledged the principle that the federal government must participate substantially in Indian water settlements more readily than the Administration has. Nevertheless, Congress has left all the parties to settlements (like the Colorado-Ute Indian pact) to fight year after year for implementing funds.

2. It took a crabbed approach to water marketing that denies Indians the same right to market water enjoyed by other water users in prior appropriation states.

In addition, the settlements all came to Congress with inadequate attention to the difficult but tremendously important issue of authority to regulate Indian and non-Indian water use on the reservation.

Indian Water Marketing in the Context of Western Water Law

It is unfair and inconsistent with the principle of integrating reserved rights into the prior appropriation system to deny Indian tribes the right to participate in economic arrangements for off-reservation use of their water. Furthermore, it is out of step with a major trend in western water policy that favors water marketing as a device to make more efficient use of our scarce water resources.

Sound principles of economics and public policy dictate that water be moved to the most productive uses; the major share of water belonging to Indian tribes should not be locked into inefficient uses. We are necessarily turning to efficient water management as an alternative to construction of major water projects as a way of meeting future needs. Therefore western states searching for new water sources ought to have the option bargaining for use of Indian water.

In the West, water rights are typically created by state law. Nearly all western water once was part of the federal public domain so that the United States could have asserted proprietorship over it. But instead the government allowed public waters to be severed from the public land and allocated to private uses under state water laws.[6] The Winters doctrine is based on the reasonable inference that when Congress created Indian reservations on the public lands, it impliedly reserved rights to enough of the water (that then was not already allocated by state law) to carry out the federal purposes for setting aside the lands.

Western states expect Indians to "play by the rules" under state water law system into which their reserved rights are integrated. Except for the fact that reserved rights need not be put use to perfect or maintain them (a fact historically explained by the continuing federal interest in waters on the public lands until such time as they are appropriated under state law), they fit into the operation of the prior appropriation system.[7] Rights to use specific quantities of water are based on the state's ranking of priorities in order of time. Thus, the rights of tribes are subject to curtailment based on their priorities relative to other water rights holders and they may not exceed the decreed quantity. They also must participate in state water rights adjudications to determine the quantities of their rights. Indeed, the Colorado Supreme Court has held in a reserved rights case that failure to adhere to state procedural requirements may preclude the United States later claiming that its right dates back to the establishment of a reservation.[8] And in the Pyramid Lake case the Supreme Court ruled that the tribe is bound by the consequences of the government's errors and ineptitude in representing tribal water rights, citing the need for finality in western water rights determinations.[9]

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[6] California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

[7] This is not to say that reserved rights are subject to state regulatory laws that may frustrate a congressional purpose or program. Thus, if state law does not recognize instream flows as a beneficial use, and to deny such rights would destroy a federal purpose in setting aside a reservation (e.g., maintaining a fishery), the state law would be preempted. Similarly, this would be the result if the United States acquired rights under the prior appropriation doctrine for the purpose of using them to carry out a statutory program for the preservation of a fishery. Federal law would preempt state water law to the extent necessary to prevent inconsistency with the federal statutory program. E.g., Fresno v. California, 372 U.S. 627 (1963) (state law preferences for domestic uses could not be applied to limit the government's use of water rights acquired under state law in reclamation project that was intended to support irrigation uses).

[8] United States v. Bell, 724 P.2d 631 (Colo. 1986) (U.S. could belatedly amend reserved rights claim to water for Naval Oil Shale Reserve but priority date would not relate back to original reservation).

It seems unconscionable to deny Indian tribe the benefits enjoyed by other water rights holders in the state system. If appropriators under state law can apply their rights to new uses and agree to leases and other arrangements that permit others to exercise their rights, there is no principled reason for denying tribes the right to engage in such "water marketing".

It has always been the prerogative of persons holding appropriative water rights to use them and to let others use them for any beneficial use. Changes in the type, manner, place or purpose of use are freely allowed subject only to the condition that no other water users, junior or senior, are injured.[10] The "no injury" rule presumably should apply to new or changed uses of Indian water rights that result in different impacts than if the rights had been put to the uses for which they were quantified.[11]

A stingy approach to water marketing, evidenced in congressional acts authorizing settlements, serves to limit the practical utility and the value of such rights. It is a backhanded way to diminish the quantity of rights that the tribes "own". Furthermore it limits the flexibility of tribes and their non-Indian neighbors to move water to the highest and best uses. It is inconsistent with the movement toward more efficient and economically beneficial uses from all the water in a watershed that is becoming the dominant policy in the West. Those who understand today's world of western water know that water marketing is a device to optimize the interests of all water users, Indian, non-Indian, agricultural, municipal and industrial.

States and non-Indian water users have no legitimate complaint about tribes seeking to change their water rights to allow for off-reservation use. The state of Colorado and our non-Indian water users did not quibble with the Ute Tribes' desire to be able to market water off their reservations. We did insist that they be subject to the same restrictions as others if they sought to market water across state lines because of the delicate balance of interstate relations struck by the Law of the Colorado River.

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[9] Nevada v. United States, 463 U.S. 110 (1983). See also Arizona v. California, 460 U.S. 605 (1983) (Indians not permitted to assert claims to water for lands omitted from government's earlier claim on their behalf because "the doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights.")

[10] Farmers Highline Canal and Reservoir Co. v. City of Golden, 129 Colo.575., 272 P.2d 629 (1954).

[11] Once quantified, Indian reserved water rights may be put to any beneficial uses, not necessarily the agricultural or other uses that were the basis for their quantification. Arizona v. California, 439 U.S. 419, 422 (1979).

The objections that were heard once the Colorado-Ute settlement reached Congress can be explained only as a misunderstanding of what is meant by water marketing, as an expression of narrow self-interest, or as an attempt to whittle away the magnitude and value of the tribes' rights.

Water marketing means:

- a tribe's leasing the right to use some of its water to an off reservation energy company

- a tribal agreement not to develop water on a reservation for a time in exchange for a payment or other concessions so that an irrigation district can have a dependable supply

- a contract that would compensate a tribe if it agreed to stop irrigating in a drought year so that a vital industry would have enough water

- an arrangement by which a city pays for lining ditches on a reservation or constructs a modern, water-saving irrigation system on a reservation in exchange for the water conserved.

It is obvious that the flexibility to enter into such deals is of potentially enormous value not only to Indian tribes but to states and their non-Indian citizens. The alternative for tribes -- without the right to market water -- is to raise and invest capital they need to develop less productive on-reservation uses such as marginal agriculture. This may (or may not) result in an economically viable enterprise. Meanwhile, neighboring non-Indian water users may be in an earnest quest for extremely valuable municipal water. Keeping the Indians locked into uneconomic water uses and barring non-Indians from access to the tribes' water serves no one's interests.

It was a recognition of the potential benefits to non-Indian water users that led the National Water Commission in 1973 to recommend that Congress enact legislation generally authorizing the leasing of Indian reserved water rights.[12] The legislation would be similar to the Indian Lands Leasing Act which allows tribes to lease their lands with the approval of the Secretary of the Interior.[13] The Commission suggested that this would help overcome the problems of uncertainty caused by the reserved rights doctrine.

One motive for opposition to Indian water marketing is to forestall paying for a benefit that is now free. Those who now use Indian water because the tribes do not use it, are benefiting from the tribes' disadvantages. If those disadvantages can be overcome, and the tribes begin using their water these people may want to have the option of buying Indian water.

Let me explain. Junior water users today enjoy use of Indian water because the tribes have lacked the resources to develop it. As long as tribes continue to be deprived of public funds to develop water, and as long as they have difficulty raising private capital, the water will continue to be unused and flow without cost to non-Indians. This is the status quo. It is maintained by economic and political conditions. But if those conditions should change, enabling fuller Indian water development, both Indians and non-Indians would be better off if the tribes could consider the option of continuing the flow of water to non-Indian junior users as an alternative to developing their water. And the non-Indians would benefit from being able to bargain for a continuation of their established uses.

What then are the proper considerations for Congress in a water marketing proposal? No water marketing can occur without congressional approval inasmuch as it is the alienation of an interest in Indian property. Thus, it is subject to the restraint on alienation inherent in the Indian Non-intercourse Act.[14] The reason for this restraint is to prevent the improvident loss or waste of Indian resources. It is for the protection of Indians and their property and as such is the essence of the Indian trust relationship. Consequently, the primary role of Congress in deciding whether to approve or disapprove of an Indian water marketing proposal should be to guard against the loss or diminishment of Indian water rights. Such concern may lead to questions about the propriety of permanent conveyances of water rights and about the adequacy of consideration. Contrast this role with Congress's alterations to the Colorado-Ute agreement. Congress mandated changes that make it possible for tribal water rights to be lost through abandonment and forfeiture, a result that was impossible under the agreement negotiated by the state, tribes and water users.

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[12] U.S. National Water Commission, Water Policies for the Future -- Final Report to the President and to the Congress 480-481 (1973).

[13] 25 U.S.C. §415.

[14] 25 U.S.C. §177.

Conclusion

In furtherance of the views expressed above, I make the following recommendations:

1. The Administration should develop a policy to give meaning to the long-standing federal commitment favoring negotiated settlements of Indian water rights disputes. The policy should be specific enough to remove the surprises and uncertainties that have plagued recent settlement negotiations. It should commit the United States to financial participation that recognizes its full trusteeship for the legal, economic, social, and cultural interests of Indian tribes. And the policy should deal with the allocation of authority between the state and the tribe for regulating and managing Indian and non-Indian water use on the reservation.

2. When negotiating Indian water issues the United States should represent Indian interests through a policy-level official who can speak for all affected federal agencies and make commitments on behalf of the government that will be fully honored by the administration and defended in Congress. The government should resolve its internal differences and conflicts of interest consistent with its trust responsibility before coming to the bargaining table.

3. Congress should respect the agreed terms of settlements among parties to Indian water rights negotiations. While it may be necessary to inquire into important national interests not considered by the parties, the fundamental structure and matters not rising to broad national concerns should not be disturbed.

4. In approving an Indian water settlement that requires federal financial participation, Congress should make as strong a commitment as possible to any necessary future funding. For instance, a bill could incorporate mechanisms such as penalties against the government or special concessions for the benefit of tribes and other parties in case funding is not forthcoming in a timely manner.

5. The Administration and Congress should adopt and implement a policy of maximizing the ability of tribes to market water held under the reserved rights doctrine or otherwise. Thus, tribal authority should be equivalent to that of state water rights holders so long as such authority

would be consistent with the federal trust responsibility. This principle should be incorporated in the Administration's Indian water settlement policy recommended above. This means that federal negotiators would advocate on behalf of tribes for the right to market water. And Congress should never modify a settlement agreement to make it more restrictive as to marketing than the parties have agreed, unless the agreement is manifestly inconsistent with the federal-tribal trust relationship or with an overriding national interest.

6. Congress should consider legislation providing blanket authority for tribes to lease their water for use off reservation. The content of the bill should be developed in consultation with Indian leaders, their attorneys, and other parties to recent settlements.

ENVIRONMENTAL DEFENSE FUND

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WATER, ECONOMICS, AND NATIVE AMERICANS

TESTIMONY IN HEARINGS ON INDIAN WATER POLICY BEFORE THE

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WATER, ECONOMICS, AND NATIVE AMERICANS

INTRODUCTION

The Select Committee has requested a synopsis of a number of factors related to water resources, economics, and water policies as they pertain to Native American tribes and communities. There is a complex array of issues involving water resources and Native American ancestral rights throughout the nation, with many of the most immediate problems and conflicts involving tribes whose lands are located in river basins west of the Mississippi River. All of these problems and conflicts have important environmental and economic implications which are of regional and often national significance.

This testimony attempts to survey these environmental and economic implications, and to identify water policies which can facilitate settlement of Native American water claims in the context of adjustment to changing economic and environmental conditions. Three sets of observations follow: (1) an overview of national and regional trends in factors which govern water demand and allocation; (2) a review of key issues now confronting federal water policymakers; and (3) a discussion of several possible reforms in Indian water policies which could help settle Indian water claims in a manner which provides economic opportunities both on- and off-reservation.

FACTORS INFLUENCING WATER DEMAND AND ALLOCATION

Water resource systems throughout the nation are governed by a complex set of state and federal laws. Combinations of these laws, which concern both quantitative allocation as well as water pollution, are a key constraint for any attempt to change the way in which water is used. More than most resource policies and decisions, those pertaining to water are dominated by the inertia of the status quo. Nevertheless, changes in these legal constraints have been and continue to be made by legislatures and the courts in response to underlying social and economic trends. To understand where future changes in policies and laws might be appropriate, a look at these trends is helpful.

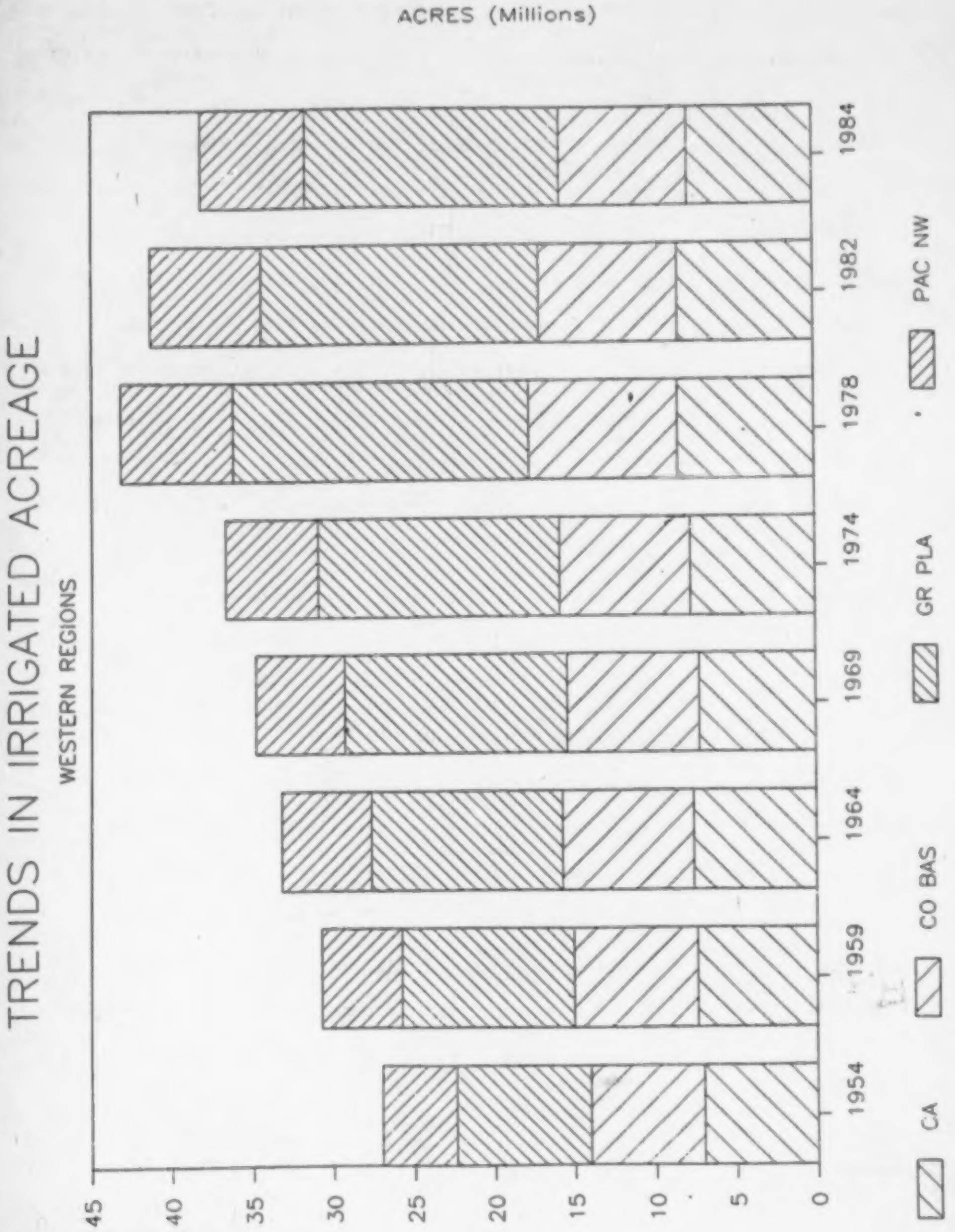
o Population Growth -- Water demands increase with population. Water conservation can break the strength of this correlation, with most types of water conservation requiring investments and education which have economic costs. Although these costs are generally less than those required by other expansions in water system capacities, economic resources are necessary for the implementation of water conservation.

Population in the United States has been increasing at slightly over 1.0% per year during the 1970's and 1980's. Ironically, some of the most dramatic population growth rates have occurred in western states within the Sun Belt and the Pacific Northwest. River basins in these regions contain the reservation lands of many Indian tribes and involve substantial tribal water claims which are the subject of a diversity of law suits as well as settlement discussions. Unless there are substantial changes in immigration, migration, and/or birth control policies, future population growth in these areas will likely continue to be substantial. Therefore, it can be expected that the potential for conflict among various uses of water, including fulfillment of Indian water claims, will continue to increase.

o Economic Growth -- Economic growth continues to be strong in many regions in which Indian water claims are substantial. The growth rate in these areas oftens exceeds the national average, in which real personal income has increased at an annual rate of over 2.0% since the early 1970's. Much of this increase in economic activity has occurred in the municipal and industrial sectors, with agriculture being relatively stable. That western irrigated agriculture is now longer a growth industry in terms of irrigated acreage is demonstrated by the data in Figure 1.

The water requirements of economic growth can be accomodated to a substantial degree by investments in water conservation. At the present time, however, conservation-inducing policies and incentives are not sufficient to avoid incremental water supply requirements for the urban growth centers. Therefore, cities and industries are looking for such supplemental supplies in most western states.

FIGURE 1

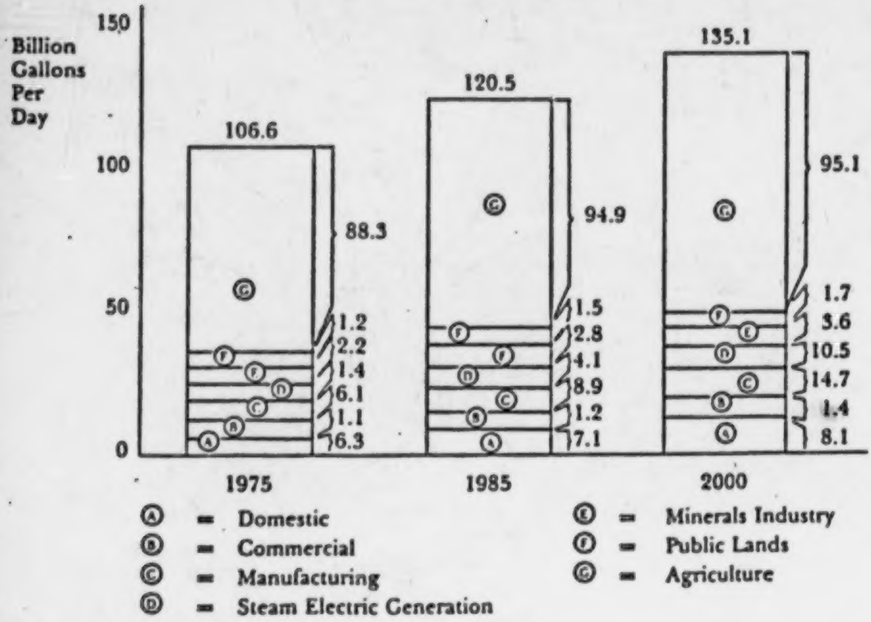

ACRES (Millions)
TRENDS IN IRRIGATED ACREAGE
WESTERN REGIONS
45
40
35
30
25
20
15
10
5
0
1954
1959
1964
1969
1974
1978
1982
1984
CA
CO BAS
GR PLA
PAC NW

o Water Availability and Demands -- Growing urbanization and industrialization -- together with an existing level of agricultural water use which exceeds 80% of total water use each year in many western states -- will make it increasingly difficult to address Indian water claims or environmental protection and rehabilitation without major new policies. Figure 2 illustrates projected growth in consumptive uses of water in the Unitied States through 2000, and illustrates the significance of increased water demands for urban and industrial uses as well as agriculture's relatively stable projected use. Most river basins west of the Mississippi are quantitatively overappropriated: existing supplies are fully claimed, if not fully utilized. (The map in Figure 3 provides indicators of the degree of reservoir development vis-a-vis water supply availability for river basins throughout the nation.) Even in the Pacific Northwest, which unlike the rest of the West is not a semi-arid region, supply shortages have become a concern. In order to accomodate growth, Indian water claims, and environmental protection and rehabilitation, there are three types of options.

* New Water Supply Development -- The best dam and reservoir sites have been developed. In some areas, such as the Colorado River Basin, existing reservoir storage exceeds water availability to the point that additional storage capacity will actually reduce firm water supplies due to increased reservoir evaporative losses. Where incremental firm yields are possible from surface storage expansion, the economic costs are substantial and increasing. Figure 4 demonstrates the historical increase in water supply costs for existing and proposed reservoirs in California. The costs of

FIGURE 2

Consumptive Uses of Fresh Water in the United States



Source: U.S. Water Resources Council, *supra* Note 1.

FIGURE 3

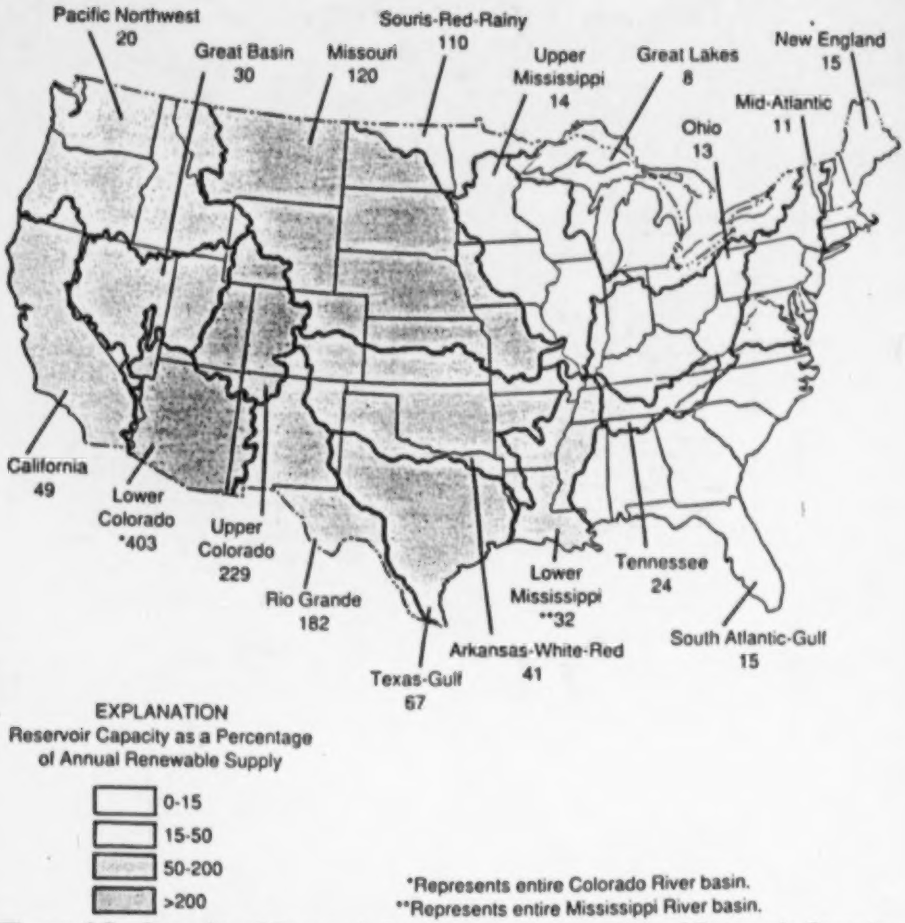
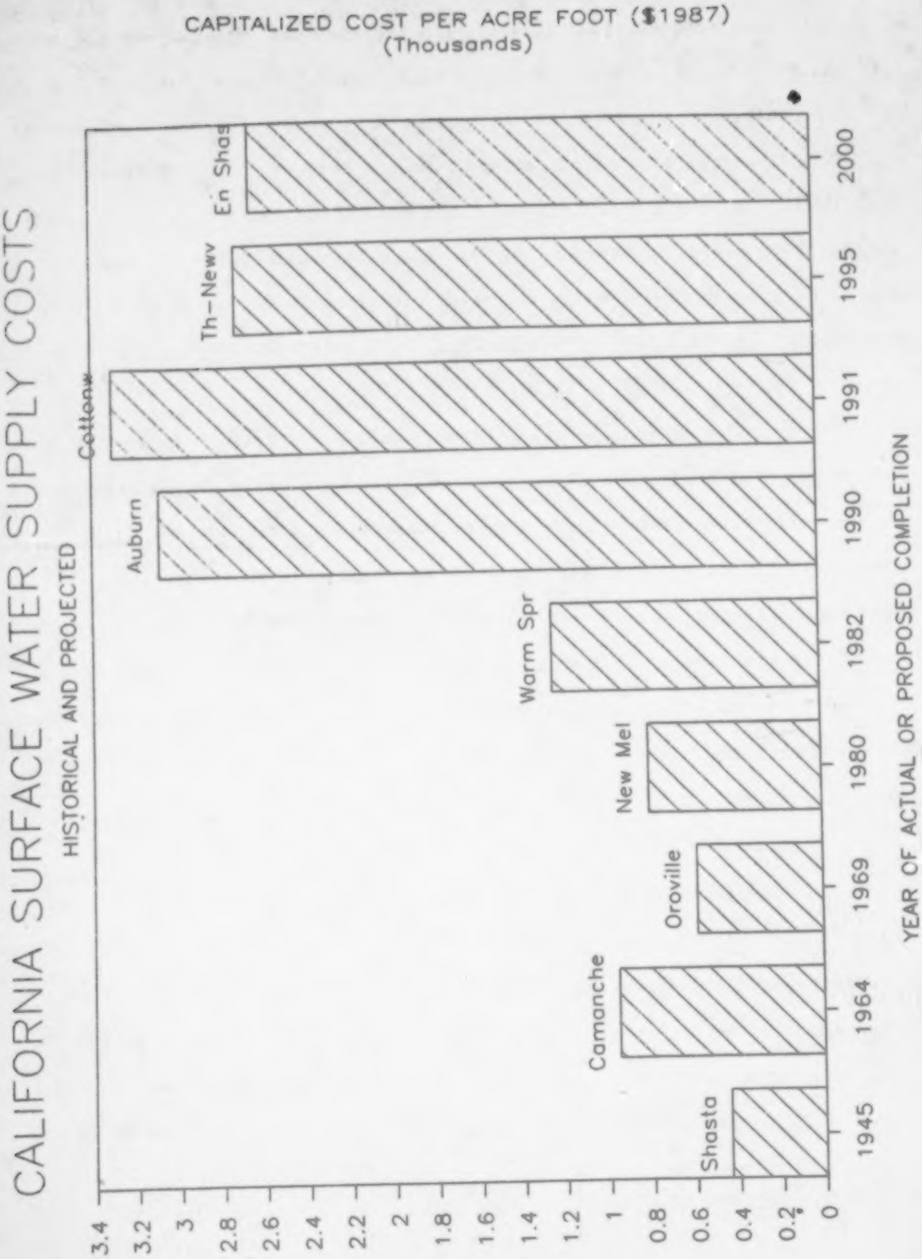

Pacific Northwest
20
Great Basin
30
Missouri
120
Souris-Red-Rainy
110
Upper
Mississippi
14
Great Lakes
8
New England
15
Mid-Atlantic
11
Ohio
13
California
49
Lower
Colorado
*403
Upper
Colorado
229
Rio Grande
182
Texas-Gulf
67
Arkansas-White-Red
41
Lower
Mississippi
**32
Tennessee
24
South Atlantic-Gulf
15
EXPLANATION
Reservoir Capacity as a Percentage
of Annual Renewable Supply
0-15
15-50
50-200
>200
*Represents entire Colorado River basin.
**Represents entire Mississippi River basin.

Figure 6-3. Intensity of Reservoir Development in Acre-feet of Reservoir Capacity per Square Mile, by Water-Resources Region. After U.S.G.S. Water-Supply Paper 2250 (1984), p. 32.

FIGURE 4


CALIFORNIA SURFACE WATER SUPPLY COSTS
HISTORICAL AND PROJECTED
CAPITALIZED COST PER ACRE FOOT ($1987)
(Thousands)
3.4
3.2
3
2.8
2.6
2.4
2.2
2
1.8
1.6
1.4
1.2
1
0.8
0.6
0.4
0.2
0
Shasta
Camanche
Oroville
New Mel
Warm Spr
Auburn
Cottonw
Th-Newv
En Shas
1945
1964
1969
1980
1982
1990
1991
1995
2000
YEAR OF ACTUAL OR PROPOSED COMPLETION

several proposed new surface facilities are around $3000 (in capitalized value) per acre foot of yield capacity (in 1987 dollars with 50 year project life and 8% interest). These costs are significantly higher than most types of water conservation and exceed the value that the water produces in many agricultural activities. Costs of proposed new surface supply projects in other western states are as high or higher than these California costs. For example, a proposed reservoir in Nevada is approximately $3000 per acre foot (Dog Creek/Truckee River) while new reservoir storage systems in Utah (Bonneville) and Colorado (Animas LaPlata) will cost over $5000 per acre foot.

Groundwater storage projects can avoid evaporation losses as well as certain types of environmental degradation. Economic costs can be significant here as well, with added water supply recovery risks stemming from toxic contamination from surface activities and hydrogeologic uncertainties. If these uncertainties can be avoided, however, groundwater storage can often be competitive with and even cheaper than surface reservoirs. For example, two proposed groundwater storage projects in southern California (Chino and Bunker Hill) are estimated to cost approximately $3000 per acre foot (capitalized/1987) of firm yield.

* Reallocation of Existing Uses -- In most western states, approximately 80% of annual water usage occurs in agriculture. The irrigation of some crops, particularly field and some livestock feed crops, has the lowest economic return of all appropriative water uses. Since irrigation is among the oldest water uses in the West, these uses tend to have senior water rights -- the higher priority uses under the appropriative doctrine of water

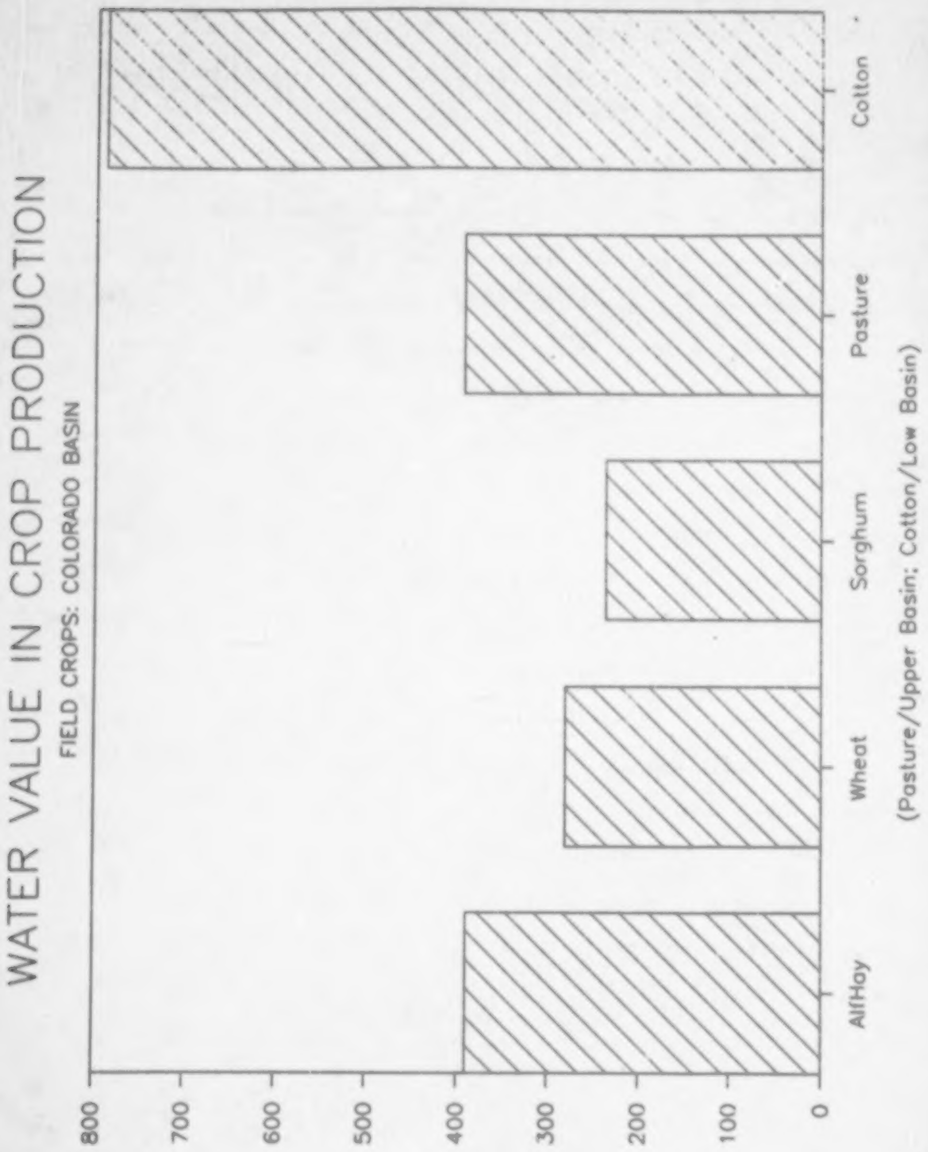
law -- or to have federal reclamation contractual rights. The costs of accomodating growth or Indian and environmental water rights by reallocating water from such uses would be much less than the costs of new supply development. Figure 5 provides data on the value of water in the production of a number of crops in farming areas within the Colorado River Basin.

The value of water in the production of many of these crops is an order of magnitude less than the cost of developing new supplies. As noted below, these values are even frequently less than the costs of agricultural water conservation. These indicators confirm what most agriculturalists already know: western irrigation economics most often cannot support the costs of new project development, and often cannot even pay for conservation investments. Other economic incentives are needed if irrigators are to be expected to adjust cropping patterns or invest in conservation measures. Compensating farmers who are willing sellers or lessors to forego such low-value uses of water reduces but does not eliminate resulting legal and political controversies. Water marketing, subject to third-party constraints, is the effective implementation policy.

* Water Conservation -- Water conservation potentials in both the urban and agricultural sectors have yet to be extensively developed. Significant economic incentives for such conservation development are needed. Existing water pricing structures tend to undervalue conservation investments since water rates are typically not tied to the marginal costs of new supply developments. In addition, urban water rates often are at least an order of magnitude greater than agricultural rates, due in part to the history of

FIGURE 5

CAPITALIZED VALUE PER ACRE FOOT ($1986)

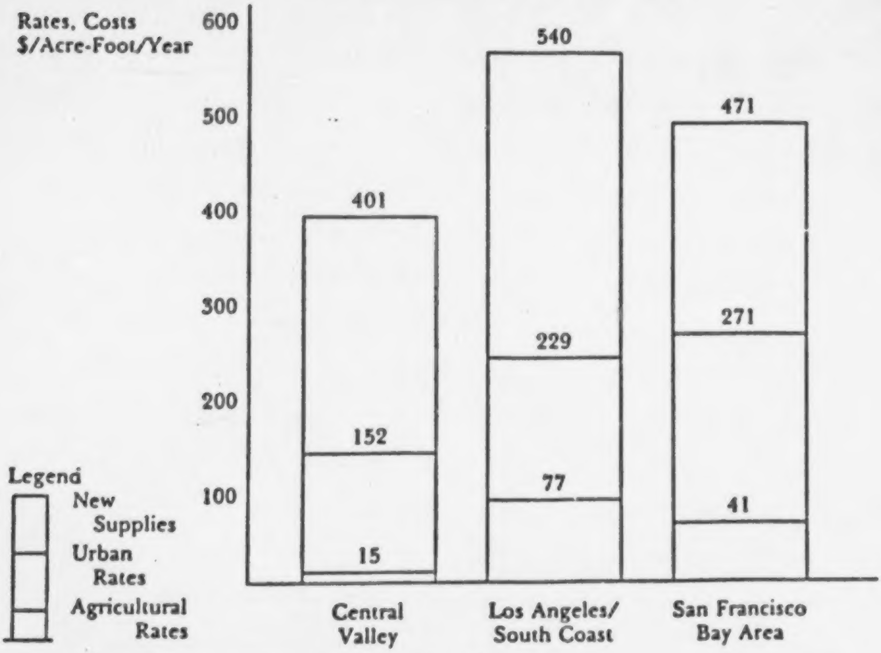


federal subsidization of agricultural water supplies and in the part to the "first in time, first in right" basis of the appropriation doctrine of state water law. This discrepancy in water rate levels is common in many regions of the nation, and is illustrated for California in Figure 6.

Depending upon the type of water conservation measure, costs range from minimal to substantial. Generally, conservation costs are substantially less than new supply costs in both economic and environmental terms. (For an economic example, the data in Figure 7 illustrate the costs (in annual terms) of agricultural water conservation measures in California's Imperial Valley, and compare the total costs of this conserved water when transferred (the so-called "water transfer scenarios") to southern California cities to the costs of several possible surface reservoir projects.) Again depending on the type of measure, conservation costs tend to be less than urban water rates and often greater than agricultural water rates. As a result, economic incentives for agricultural water conservation are usually not sufficient to justify investments in conservation based only on the economic value of the saved water. Allowing conserved water to be marketed tends to substantially increase this value of saved water and can be an effective implementation policy. The sample water market prices for several western states listed in Table 1 illustrate this economic value.

FIGURE 6

Retail Rates* and Costs of New Surface Supplies** in California's Water System (1985)



* Averages of area retail rates within each region.

** Average FOB costs of five major new surface water supply facilities proposed during the 1979-82 period.

Source: California Department of Water Resources, Bulletin 160-83, (1983); Willey, *supra* Note 18, at 26.

FIGURE 7

TABLE 1. Opportunities for Water Conservation in the Imperial Irrigation District.

Source of Saved Water	Estimated Annual Loss (acre-feet)	Estimated Annual Amount to be Saved (acre-feet)	Unit Cost of Water ($/AF)*
	DISTRICT CONTROLLED		
Line All-American Canal**	78,000	70,000	115
Line Main Canals & Laterals	122,000	110,000	31
Expand Seepage Recovery System	78,000	30,000	14
Canal Spills: construct more regulatory reservoirs			34
Canal Spills: expand electronic monitoring control and provide more flexible deliveries	53,000	50,000	Unknown
(SUBTOTAL)	(331,000)	(260,000)	
	FARMER CONTROLLED		
Improve On-Farm Irrigation Techniques re. Leach Water	570,000	178,000	Variable
Expand Use of Tailwater Recovery			8-25
(SUBTOTAL)	(570,000)	(178,000)	
TOTAL	901,000	437,000	

*Based upon 30-year life and 12 percent interest; 1981 dollars.

**Pilot Knob to East Highline Canal.

Source: California Department of Water Resources. Investigation Under California Water Code Section 275 of Use of Water by Imperial Irrigation District. Southern District, December 1981, pp. 56, 60, and 61.

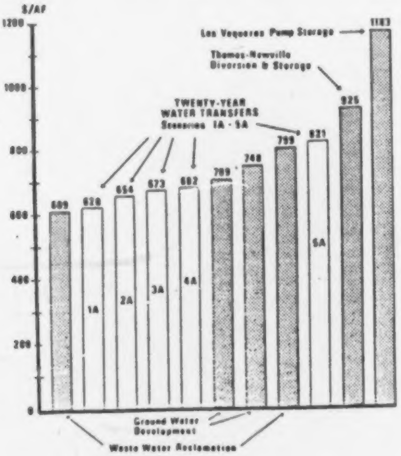


Figure 1. Marginal Costs of 20-Year Water Transfers Compared with Marginal Costs of Alternative MWD Supply Augmentation Programs.

TABLE 1

Sample Water Market Transactions/Western States/1987

State	Source/Region	Amounts Per Transaction (Acre-Feet/Year)	Price ($/Acre-Foot) [$/Acre-Foot/Year]
Arizona	Ground/Central	500-2000	500-1200 [50-120]
	Surface/Southern	300-400	2000 [200]
California	Ground/South Coast	100-1000	1500 [150]
Colorado	Surface/East	2000-5000	1900-3500 [190-350]
Nevada	Surface/West Central	10-1000	2000 [200]
New Mexico	Surface/North Central	50-300	1000 [100]
Texas	Surface/Southwest	100-2000	500-650 [50-65]

FEDERAL WATER POLICY REFORMS

Urban growth, Indian water claims, and environmental rehabilitation are the primary societal values which will require that adjustments in existing water use patterns be implemented in the future. Federal water agencies have been concerned during most of this century principally with the development of surface storage facilities primarily for agriculture (U.S. Bureau of Reclamation); to control floods and protect property (U.S. Army Corps of Engineers); and to control water pollution (U.S. Environmental Protection Agency). Ancillary missions have been directed at fish and wildlife protection (U.S. Fish and Wildlife Service) and the fulfillment of Indian water claims for tribal development (U.S. Bureau of Indian Affairs).

The reclamation and flood-control goals have largely been accomplished, and the economic infeasibility of any significant further activity in these areas makes revision of the missions of the Bureau of Reclamation and the Corps of Engineers imperative. The Bureau is attempting to do that as noted in its 1987 statement of proposed new directions. A thorough review of the present and future roles in water policy which these agencies can play would be useful at this time.

Attachment A is an article entitled "Federal Water Policy in the United States -- An Agenda for Economic and Environmental Reform" which was published in 1988 in the Columbia Journal of Environmental Law. The roles in water policy of federal agencies as well as of market-based incentives are discussed. The basic policy reform that needs to be instituted in federal water policy is the active implementation of market and incentive-based systems for water transactions -- both quantitative and qualitative -- as the most effective means of achieving needed adjustments to accomodate urban growth, Indian water claims, and environmental rehabilitation. Any adjustments will cause controversy and conflict, but the protection of existing rights and reliance on voluntarism which are made possible by market solutions imply less legal and political conflict than the more traditional regulatory approaches. Four elements in such a federal water policy, working in tandem with state water laws, are central.

o Water Marketing -- Clear federal policy, probably in the form of generic federal water marketing legislation, is needed to implement the voluntary transfers of contractual rights to reclamation water supplies. The Department of Interior's current approach is to respond to proposals for transfer on an individual basis when presented. Clarity is needed so that reclamation contractors know that their contractual rights will not be undermined by consideration of transfer options, and Bureau of Reclamation officials will have clear policy guidelines on such transfers.

Such marketability of federal reclamation contract water would provide a major incentive for agricultural water conservation and reallocation, and thereby would create an opportunity to address Indian and environmental water issues. In addition, water pollution loads resulting from irrigation would be reduced, creating another opportunity for environmental protection. In effect, nonpoint source pollution controls, hailed in theory for over a decade under the Clean Water Act as "best management practices," would become the subject of real economic incentives for implementation by irrigators. Contamination of federal wildlife refuges as well as other water resources which have resulted from reclamation project drainage would be reduced by such implementation.

o Tradable Water Pollution Discharge Permits -- Nonpoint water pollution sources, particulary from agriculture, dispersed toxic sites, and urban runoff, constitute a major unresolved American pollution problem. (Table 2 shows the extent of lake and river degradation as well as type of source of these pollutants.) These pollutants impact both surface and ground water and their control remains to be effectively addressed. Congress has recognized these problems for some time and has attempted to address them in amendments to the Clean Water Act. However, an effective incentive system has yet to be implemented. Tradable discharge permit systems, with maximum allowable basinwide pollutant loadings set by regulatory authorities, appear to offer a feasible and economically-sensible means of improving water quality.

This type of water quality policy would focus the attention of the Environmental Protection Agency and various state agencies on the establishment of water quality standards and pollution loading limits within various segments of the nation's watersheds. The burden of technological and economic evaluations and oversight which the agencies presently have as part of the issuance of individual permits would be much reduced. Identification, monitoring, and enforcement of the terms of the permits, particularly for nonpoint sources, would continue to be problems for the agencies and/or for private sector groups.

TABLE 2

Primary NonPoint Sources of Pollutants in Use-Impaired Waters* in the United States

Rivers		Lakes
64%	Agriculture	57%
4%	Hydro-Modification	13%
5%	Urban Runoff	12%
1%	Land Disposal	5%
2%	Construction	4%
9%	Resource Extraction	1%
6%	Silviculture	1%
9%	Other	7%

Primary Nonpoint Source Pollutants in Use-Impaired Waters* in the United States

Rivers		Lakes
47%	Sediments	22%
13%	Nutrients	58%
9%	Pathogens	2%
9%	Physical Habitat Alteration	4%
7%	Acidity	4%
6%	Toxics	3%
4%	Oxygen Demand	3%
3%	Pesticides	1%
2%	Salinity	3%

* Waters in which uses are severely or moderately impaired by nonpoint sources or in which nonpoint sources threaten to impair the designated use.

Source: ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS, *supra* Note 1.

o Water Acquisitions for Public Uses -- Many uses of water which are presently managed by public agencies, such as fish and wildlife protection, have no water rights other than those resulting from regulatory or court proceedings. Mechanisms such as instream flow standards are a step in the direction of establishing such rights, but their priority vis-a-vis existing appropriative and riparian rights under state law is a major uncertainty. This uncertainty can be reduced considerably by outright acquisition of existing water rights and assignment of those rights to environmental uses such as instream flows or wetland habitats.

A project intended to acquire water rights for a public use is currently underway in California with respect to the preservation of the Mono Lake ecosystem. Attachment 2 is a Time Magazine story in the April 3, 1989 issue concerning this project. Other projects which, like the Mono Lake project, are utilizing water marketing and acquisitions as a means of enhancing environmental water uses are being developed in a number of western states.

o Liability and Compensation for Damages -- Consumptive use and pollution of water often damages other water users. Legal avenues for redress involve property, nuisance, and tort law. Some precedent exists for compensation to the public for resources damages, such as the Department of Interior regulations for assessing damages to natural resources from oil or hazardous substance release (which will presumably be applied soon to the Prince William Sound oil spill). Similar procedures are necessary to assess compensation for the entire spectrum of pollutant damage to water resources.

These procedures would be helpful in protecting both public and private water rights, and should be applied to the water pollution damages caused by public agencies as well as private entities.

INDIAN WATER POLICY

These trends and policies have major implications for Indian water policies. The terms of settlement of Indian water claims is a major uncertainty for water users in most western river basins and states. It appears that there are three principles which must guide Indian water policy:

- Tribal sovereignty -- Indian tribal governments must have the autonomy to make independent water policy decisions;

- Economic development -- An important corollary of tribal sovereignty is that tribes must have the flexibility to make economically-sensible decisions about their water resources, including the establishment of extra-reservation arrangements involving water;

- Tribal water rights -- The reserved and aboriginal water rights of tribes must be recognized and fulfilled. Settlements involving tribes, state and federal governments, and other water interests are necessary to remove the substantial uncertainties which presently face both Indian and non-Indian water managers.

These principles lead to several recommendations which would require Congressional action:

o Winters Doctrine -- The exclusive application of agricultural criteria to the quantification of tribal water rights is inappropriate. It may have been appropriate in the past for tribes with predominately agricultural traditions, but the changing economic circumstances of agriculture -- particularly during the past decade -- make this an outmoded criterion. For many tribes, such as those with cultural roots in fishing, the agricultural criterion probably never was appropriate. In the negotiation of water rights settlements, tribes should be free to suggest non-agricultural criteria for quantification of claims, including for fish, wildlife, recreation, and other uses.

o Water Marketing and Exchanges -- The Nonintercourse Act should be amended to allow individual tribes to negotiate water marketing agreements with off-reservation water interests. Water sales and leases can provide a major income-producing opportunity which can enhance tribal economic development. At the same time, the water supply uncertainties which other water users presently face can be alleviated by the opportunity to negotiate with tribes for water acquisitions.

o Water Quality -- The previous discussion of tradable discharge permits, liability, and compensation should be applied to tribes within the context of tribal sovereignty. That is, tribes ought to have the same opportunities to trade pollution rights and seek compensation when dealing with off-reservation water interests. On the other hand, on-reservation water quality policies should be a matter left to individual tribal discretion. To the degree that these on-reservation policies affect off-reservation uses, the same liability provisions that apply to non-Indian water users should apply to the tribes. At the same time, in establishment of the distribution of pollution rights in any basin, allotment of a portion of those rights to tribes would provide another opportunity for tribal income and economic development which would be financed by the regional economy.

CONCLUDING REMARKS

Major reforms in federal water policy in general and Indian water policy in particular are overdue. Economic and environmental conditions have changed. The rigidities of existing federal water policies and agencies are increasingly a major barrier to efficient and equitable adjustments to these changes. The problems are compounded by the federal government's increasing inability to finance many of the changes that are needed. Securing appropriations for settlement of tribal or environmental water conflicts promises to be a greater constraint in the future than has been the case in the past.

The policy responses suggested here as a means of accomodating present and future water requirements have not been implemented to a significant degree by federal water, tribal, and environmental agencies. Congressional revision of a number of aspects of reclamation, water, pollution, and Indian laws would facilitate these policy responses.

SOURCES -- Data sources and more detailed discussion of the information presented in the figures and tables can be found in the following publications:

1. Figure 1: U.S. Department of Agriculture, *Agricultural Statistics*, 1987

2. Figure 2: Willey, Zach, and Tom Graff, "Federal Water Policy in the United States -- An Agenda for Economic and Environmental Reform," *Columbia Journal of Environmental Law*, Volume 13, Number 2, 1988, p.328

3. Figure 3: American Indian Resources Institute, *Tribal Water Management Handbook*, 1988, p.78

4. Figure 4: California Department of Water Resources, *The California Water Plan: Projected Use and Available Water Supplies to 2010*, Bulletin 160-83, 1983. Annual water yield costs are capitalized over 50 years at 8%.

5. Figure 5: Data computed from analyses in C. W. Howe and W.A. Ahrens, "Water Resources of the Upper Colorado River Basin: Problems and Policy Alternatives", and W.E. Martin et al, "Toward Sustaining a Desert Metropolis: Water and Land Use in Tucson, Arizona," in M.T. El-Ashry and D.C. Gibbons, *Water and Arid Lands in the Western United States*, Cambridge University Press, 1988. Annual water values are capitalized over 50 years at 8%.

6. Figure 6: Willey and Graff, *op cit*, p.335

7. Figure 7: Stavins, Robert, and Zach Willey, "Trading Conservation Investments for Water," *American Water Resources Association*, October, 1983

8. Table 1: Willey and Graff, *op cit*, p.332

9. Table 2: Willey and Graff, *op cit*, p.328-29

ATTACHMENT 1

FEDERAL WATER POLICY IN THE UNITED STATES— AN AGENDA FOR ECONOMIC AND ENVIRONMENTAL REFORM

ZACH WILLEY
TOM GRAFF

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Federal Water Policy in the United States—An Agenda for Economic and Environmental Reform

Zach Willey
Tom Graff

I. Background

A. *Water Resources and Changing Values*

Water policy in the United States is outmoded and irrational. It is a policy which, at its inception around the turn of the century, served the needs of a developing nation. Not until the past two decades has there been an effort to control the pollution impacts of a half-century of development. During the era of development, water resources were extensively used and depleted, in part because water was available at very low, heavily subsidized prices. Early pro-development government policy essentially gave away resources. Outright land grants and timber, mineral, and grazing leases provided incentives for settlers and developers to risk financial capital as well as their own labor. Water supply and flood control projects were underwritten by the taxpayer to stimulate agricultural and urban developments. Water pollution controls, where achieved, were also heavily supported with federal taxpayers' funds.

Whatever its prior justification, the policy of subsidizing to promote development is no longer appropriate because environmental needs, social values, and economic conditions have changed. An entire array of social and environmental costs resulting from this policy have come to be recognized, making its overall net benefit much less attractive. Habitats and watersheds have been degraded and destroyed;[1] drinking water has been contaminated;[2] water supplies have been exhausted.[3] These costs have been exacerbated by a dramatic increase in market and non-market demand for alternative uses of water resources. Satisfaction of these demands, including growing recreational, fisheries, wildlife, human health, tourism, scientific, and aesthetic uses are determined in large part by water availability and quality conditions in the nation's river basins, groundwater aquifers, lakes, deltas, wetlands, and bays.[4] Agricultural, industrial, and municipal water uses have been, and continue to be, the major causes of degradation of aquatic systems.[5] In a country long on the availability of water resources and short on developed agricultural and urban water supplies, degradation probably made economic and social sense. Degradation no longer makes sense, however, due to the diminished supply of and increased demand for alternate water resource uses. In the United States, the relative values among alternate water resource uses, urban uses, and agricultural uses have shifted significantly.

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[1] *See, e.g.*, Association of State and Interstate Water Pollution Control Administrators, America's Clean Water, The States' Nonpoint Source Assessment (1985); Smith, Alexander & Wolman, *Water Quality Trends in the Nation's Rivers*, 235 Science 1607 (1987); 1 U.S. Water Resources Council, The Nation's Water Resources — Second National Water Assessment (1978).

B. *Continuing Water Resource Degradation*

United States water policy is premised upon a set of antiquated values which favor agricultural and, to a lesser degree, urban uses. Taxpayer revenues continue to subsidize agricultural water supplies as well as the production of some agricultural commodities.[6] As a result, water is overallocated to agriculture. More recent events, such as toxic contamination in groundwater from industrial and agricultural chemicals,[7] acid deposition,[8] and climate change,[9] show the importance of reforms in water and related natural resource policies. These "new" water resource problems are upon us despite the fact that we have yet to effectively address "old" problems. Figure 1 shows estimates of shares of total U.S. freshwater withdrawals and consumption by type of use for 1975 and projected for 2000. Perhaps more important and less obvious, water pollution—particularly from nonpoint sources[10]—continues to be significant and the resulting damages and costs large.[11] Figures 2 and 3 show nonpoint pollutants: nutrients, pathogens, sediments, toxics, pesticides, acidity, salinity, and oxygen demand, and their sources: primarily agricultural, in impacted water systems with severe or moderate impairment of uses.

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[2] V. Pye, R. Patrick & J. Quarles, Groundwater Contamination in the United States (1983). An excellent collection of articles on groundwater can be found in 9 J. Freshwater (1985).

[3] *See, e.g.*, 1 U.S. Water Resources Council, *supra* note 1; M. El-Ashry & D. Gibbons, Troubled Waters — New Policies for Managing Water in the American West (World Resources Institute, 1986).

[4] For an overview, see National Water Commission, Water Policies for the Future: Final Report to the President and to the Congress (1973); *see also* Association of State and Interstate Water Pollution Control Administrators, *supra* note 1.

[5] *See* Association of State and Interstate Water Pollution Control Administrators, *supra* note 1; *see also* U.S. General Accounting Office, The Nation's Water — Key Unanswered Questions About the Quality of Rivers and Streams 68-69 (1986).

[6] Federal irrigation water subsidies are discussed in K. Frederick, Water for Western Agriculture 66-71 (Resources for the Future, 1982), and in M. El-Ashry and D. Gibbon, *supra* note 3. Crop subsidy programs are reviewed in L. Glaser, Provisions of the Food Security Act of 1985 (Economic Research Service, U.S. Department of Agriculture, 1986).

[7] V. Pye, R. Patrick & J Quarles, *supra* note 2; 9 J. Freshwater, *supra* note 2.

C. *Federal Agencies — A Key Problem*

There are a number of federal agencies which are responsible for various aspects of the nation's water policy. These agencies often fail to operate in a coherent manner in part because their respective authorizing missions are at best in need of modernization and at worst inconsistent. There are many examples of and reasons for the resulting bureaucratic confusion.

The U.S. Bureau of Reclamation and the Army Corps of Engineers, the federal agencies with water project development era missions, have floundered for nearly two decades in search of a new mission.[12] In the Bureau's case, it took 80 years for Congress

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[8] The acid rain literature has grown enormously during the past few years. *See, e.g.*, U.S. Environmental Protection Agency, Acid Rain (EPA-600/9-79-036) (1980); Epstein, Oppenheimer & Yuhnke, *Acid Deposition, Smelter Emissions, and the Linearity Issue in the Western United States*, 229 Science 859, (1985).

[9] National Research Council, Changing Climate (1983).

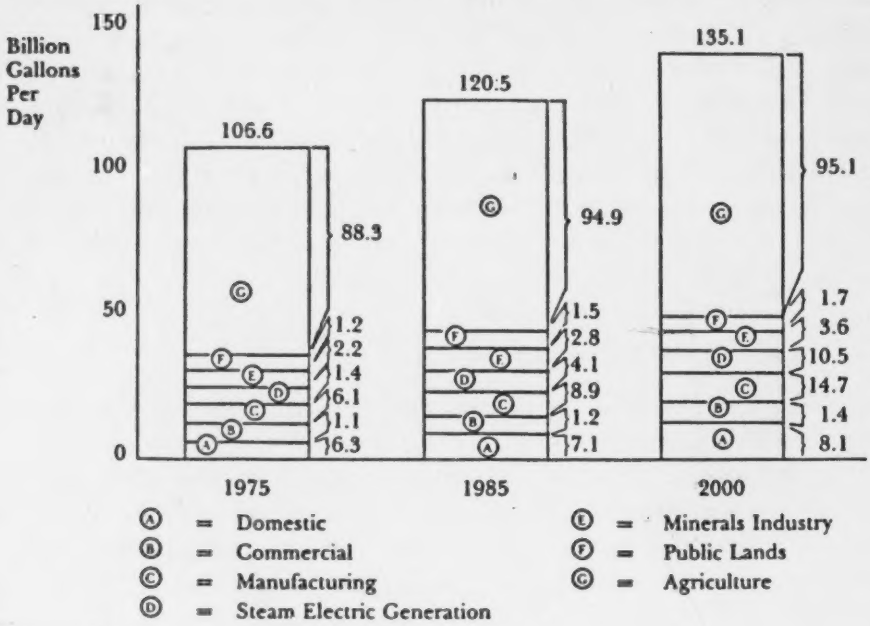
[10] "Nonpoint sources" of pollution can be defined as "those diffuse sources of pollution that are not covered by a site-specific Federal permit. The most common nonpoint source activities are agriculture, hydromodification, resource extraction, urban runoff, land disposal, construction, and silviculture." *See* Association of State and Interstate Water Pollution Control Administrators, *supra* note 1.

[11] An excellent collection of papers on nonpoint source pollution issues can be found in *Nonpoint Water Pollution — A Special Issue*, J. Soil & Water Conservation Jan.-Feb. 1985.

[12] New water project authorizations have become very infrequent for both the Bureau and the Corps. The cost-sharing requirements imposed upon water project beneficiaries during the past decade by the federal administrations have had a significant impact upon the demand for new projects. New agency missions are being sought, as is evidenced in U.S. Department of Interior, Assessment '87. . .A New Direction for the Bureau of Reclamation (1987).

Figure 1

Consumptive Uses of Fresh Water in the United States



Source: U.S. WATER RESOURCES COUNCIL, *supra* Note 1.

Figure 2

Primary Nonpoint Source Pollutants in Use-Impaired Waters* in the United States

Rivers		Lakes
47%	Sediments	22%
13%	Nutrients	58%
9%	Pathogens	2%
9%	Physical Habitat Alteration	4%
7%	Acidity	4%
6%	Toxics	3%
4%	Oxygen Demand	3%
3%	Pesticides	1%
2%	Salinity	3%

* Waters in which uses are severely or moderately impaired by nonpoint sources or in which nonpoint sources threaten to impair the designated use.

Source: ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS, *supra* Note 1.

Figure 3
Primary NonPoint Sources of Pollutants in Use-Impaired Waters* in the United States

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9%	Resource Extraction	1%
6%	Silviculture	1%
9%	Other	7%

* Waters in which uses are severely or moderately impaired by nonpoint sources or in which nonpoint sources threaten to impair the designated use.

Source: Association of State and Interstate Water Pollution Control Administrators, *supra* Note 1.

to amend the Reclamation Act,[13] and the resulting reforms now being implemented will have at best a minor effect on the consumptive and polluting aspects of federal reclamation projects. Over its history, the Bureau has developed a tradition of water project expertise that is no longer useful as a federal service. Current attempts to redirect that agency toward a new water management and environmental protection mission seem to be ill-conceived and may result in more duplication and conflict with the missions of other agencies.

Other federal water resource management agencies have problems which are perhaps not as severe as are those of the Bureau of Reclamation but are nevertheless cause for serious concern. The U.S. Fish and Wildlife Service, charged with protection and enhancement of the nation's wildlife resources, still finds itself unable to take the initiative, and continues in a mitigative, low priority role among the Department of Interior agencies.[14] The

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[13] The Reclamation Act, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.), was signed into law on June 17, 1902 by President Theodore Roosevelt. The Reclamation Reform Act, Pub L. No. 97-293, 96 Stat. 1263 (codified in scattered sections of 25 & 43 U.S.C.) was enacted in 1982. The 1982 amendments principally addressed issues of project cost repayment and acreage limitations. The Reclamation Project Act of 1939, ch. 418 §§ 1-19, 53 Stat. 1187 (codified as amended in scattered sections of 43 U.S.C.) recognized municipal and industrial water as a multiple-purpose benefit and set standards for cost allocations and interest.

[14] The mitigative role of the U.S. Fish and Wildlife Service (USFWS) is exemplified by the consultative procedures utilized in implementing the Fish and Wildlife Coordination Act. Regarding the impacts of federal water projects on fish and wildlife, for example, the USFWS is typically asked to render a "biological opinion" by the Bureau of Reclamation or the Army Corps of Engineers. This process has been viewed by some as fundamentally deficient in protecting fish and wildlife values due to ". . . a longstanding apparent judicial

U.S. Department of Agriculture, the Forest Service, and the Bureau of Land Management continue to degrade vast areas of the nation's watersheds by using economic calculations which recognize the benefits of crop, timber, and livestock production but do not acknowledge the full array of costs resulting from the degradation of fish and wildlife habitat, recreational, and water supply uses. The federal water projects which were initiated with hydroelectric generation and irrigation as a central goal (such as the Bonneville Project in the Pacific Northwest) continue to operate river basin facilities to provide cheap irrigation water and energy to their selected beneficiaries, often at the expense of other uses such as fisheries, wildlife, and recreation.[15]

The federal water pollution control mission, while not burdened with a long and complicated history, is approaching a point at which the feasibility of many of its regulatory programs seems to require careful scrutiny. A long history of failed attempts at water pollution control resulted in the passage of the Federal Clean Water Act in 1972. The Act has subsequently been amended, and yet there is still no credible control of many water pollutants, particularly those emanating from the nonpoint sources. The U.S. Environmental Protection Agency has been engaged since its inception in attempts to design technological standards for water pollution controls, to distribute subsidies to control the point sources of pollutants from cities and industries, and subsequently to implement what have often been symbolic enforcement actions. It is now contemplating the much more difficult problems involved in the control of nonpoint sources of water pollution, including agricultural sources,[16] without the benefit of past generous subsidy programs.

The list of rigidities with which federal water policy is afflicted is long indeed. The growing social and environmental demand for alternative uses of water resources, in addition to the urban and agricultural uses which have characterized economic develop-

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hostility to the Coordination Act, perhaps reflecting a fundamental unease with putting fish and wildlife values on a par with other more traditional societal values." M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 208 (Report to the Council of Environmental Quality, 1977).

[15] *See* Butcher & Wandschneider, *Competition Between Irrigation and Hydropower in the Pacific Northwest*, in SCARCE WATER AND INSTITUTIONAL CHANGE 25 (Resources for the Future, K. Fredrick ed. 1986).

[16] U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY — 1986 REPORT TO CONGRESS 121-26 (EPA-440/4-87-008) (1987).

ment in this country, have become widely recognized, but the federal policy response, as embodied in implementation activities by the federal agencies, has been inadequate. Given the momentum of outmoded or ill-conceived federal agency missions, how can these changing demands be incorporated into a reformed set of water policies? A discussion of the dimensions of water resource valuation, followed by a survey of relevant federal agencies and useful reforms, may provide some direction.

II. VALUATION OF WATER RESOURCES

The valuation of alternative water resource uses involves an array of both private and public considerations. The economic value of water resources is well-defined for some uses and not for others. This is a key reason why the allocation of water resources to alternative uses involves a complex mix of market and political processes.

A. *Economic Valuation of Private Uses*

Valuation is achievable when conditions for private ownership and/or control (including an ability to implement use-exclusion) exist and when prices are observable (e.g. through market transactions or direct sales).[17] Such private uses typically involve diversion and storage of water for agricultural, municipal, industrial, or power production purposes, as well as the use of water systems for pollution discharge purposes. In addition, however, private uses can be associated with the maintenance of instream flows or wetland habitats, which can depend upon both water availability and quality. While ownership conditions become more difficult to define in many of these cases, private economic benefits are generated from such activities as fishing, hunting, boating and whitewater rafting.

1. Water Market Prices

There are numerous examples of economic valuation of private water uses. In areas of the western United States where water markets are operative, water prices are directly observable. Table

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[17] Two interesting and different discussions of private and public values can be found in J. GWARTNEY & R. STROUP, ECONOMICS — PRIVATE AND PUBLIC CHOICE (1982) and in R. LIND, DISCOUNTING FOR TIME AND RISK IN ENERGY POLICY (Resources for the Future, 1982).

1 lists prices for water in several western states observed in 1987. These prices vary considerably depending upon site-specific conditions of demand, hydrologic variability, priority of water rights, and costs of alternative supplies. The appropriative rights doctrine, which provides the ownership condition required for such transactions, is the governing legal principle in most western states. In California, for example, over half of the annual use of water is governed by appropriative water rights held either by individual or district appropriators. In addition, large federal and state water supply projects allocate their supplies by contract.[18]

Table 1[19]

Sample Water Market Transactions/Western States/1987

State	Source/Region	Amounts Per Transaction (Acre-Feet/Year)	Price ($/Acre-Foot) [$/Acre-Foot/Year]
Arizona	Ground/Central	500-2000	500-1200 [50-120]
	Surface/Southern	300-400	2000 [200]
California	Ground/South Coast	100-1000	1500 [150]
Colorado	Surface/East	2000-5000	1900-3500 [190-350]
Nevada	Surface/West Central	10-1000	2000 [200]
New Mexico	Surface/North Central	50-300	1000 [100]
Texas	Surface/Southwest	100-2000	500-650 [50-65]

2. Valuation in Production

Water market transactions provide the closest thing to an economic measure of water value available in the United States. Yet, as is noted below, these prices are often not "efficient" in an economic sense due to market failures — where, for instance, competitive conditions do not exist, or external effects are not reflected in the observed transaction price. Another method of water valuation, often used in real estate assessment, evaluates income generated from water use and land values associated with water use.[20] Income potentials are assessed by calculating the discounted future stream of income associated with the water's use for such purposes as agricultural irrigation, fishery habitat maintenance, or industrial processing. Table 2 illustrates this method for an alfalfa hay production operation in western Nevada, where the "break-even" price of water is calculated from its irrigation production value. In addition, the land valuation method examines, where possible, the difference in land prices of similar parcels with and without water rights.

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[18] *See* Z. WILLEY, ECONOMIC DEVELOPMENT AND ENVIRONMENTAL QUALITY IN CALIFORNIA'S WATER SYSTEM (Institute of Governmental Studies, University of California, Berkeley, 1985).

[19] 1 *Water Market Update* (data taken from various articles published in 1987).

Table 2[21]
Water Valuation for Alfalfa Hay Irrigation/Western Nevada/1985*

	Water Use Options	
	Irrigate	Sell
I. Crop Production*		
($/Acre/Year)		
— Income	425	—
— Costs		
• Fixed	90	90
• Variable	146	—
• Water	18	18
• Total	254	108
— Profit	171	(108)
II. Average Water Values		
$/Acre-Foot/Year		
[$/Acre-Foot]		
— Irrigation	28 [359]	—
— Sell (Break-Even)	—	46 [585]

* 5 Tons/Acre; $85/Ton; 7 Year Stand.

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[20] For an overview, see B. Saliba & D. Bush, Water Markets in Theory and Practice: Market Transfers, Water Values, and Public Policy (1987).

[21] D. Yardas & Z. Willey, Least Cost Water Supply Planning in the Truckee and

3. Water Costs and Rates

A cost-based (as opposed to a value-based) approach provides another method of water valuation. Throughout the United States, urban water and sewage districts and agricultural water and drainage districts charge rates and assessments in various ways for delivery of water supplies and for conveyance of pollution discharges. Urban rates often are at least an order of magnitude greater than agricultural rates, due in part to the history of federal subsidization of agricultural water supplies and in part to the "first in time, first in right" basis of water appropriation doctrine. This discrepancy in rate levels is common in many regions of the nation,[22] and is an indication of changing demands inadequately addressed by federal water policies, and of potentials for water markets to facilitate the reallocation of supplies. In addition, existing rates are useful in providing a floor for water resource valuations since they represent what water consumers actually pay. Finally, the incremental or marginal costs of developing new water supplies or new pollution treatment facilities provide a related lower bound on the values of some uses of water resources. The costs of such new facilities represent, in the absence of subsidies or other economic distortions, a measure of willingness-to-pay for water resources for certain types of users. The data on variations in water rates and on the costs of new water supply projects displayed in Figure 4 illustrate such lower bounds on valuation in California's water system.

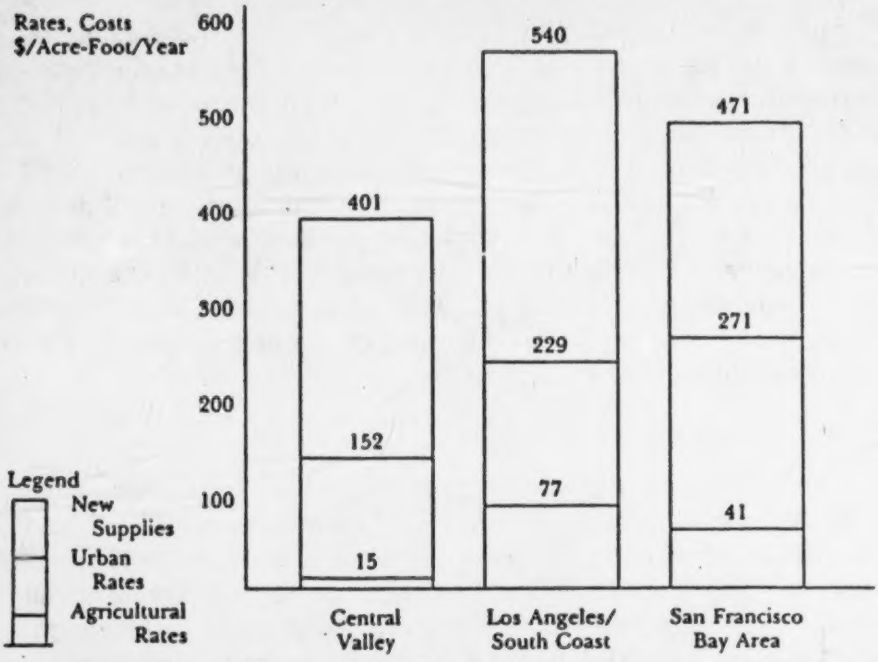
B. *Economic Valuation of Public Water Uses*

The term "public water uses" refers to uses for which the preconditions for private ownership do not exist. Generally, these are caused by "market failures" which have provided the traditional rationale for public intervention, regulation, and even ownership of water resources. Four classes of market failures are typically cited: "third party" effects, public goods, natural monopolies, and equity considerations.

CARSON RIVER BASINS (Paper presented at the Nevada Water Resources Association Annual Conference, Feb. 25, 1987).

[22] *See* D. GIBBONS, THE ECONOMIC VALUE OF WATER (Resources for the Future, 1986).

Figure 4
Retail Rates* and Costs of New Surface Supplies** in
California's Water System (1985)



* Averages of area retail rates within each region.
** Average FOB costs of five major new surface water supply facilities proposed during the 1979-82 period.
Source: CALIFORNIA DEPARTMENT OF WATER RESOURCES, BULLETIN 160-83, (1983); WILLEY, *supra* Note 18, at 26.

1. "Third Party" Effects

Externalities or "third party" effects arise whenever outside values are affected by private uses and transactions.[23] The adverse effects of streamflow diversions or pollution discharges on downstream water uses is a classic example of an externality. Less tangible, but perhaps more profound, are the externalities that affect future generations.[24] This can occur when certain types of water use (such as groundwater contamination) effectively preclude other types of water use in the future. This affects the interests of future generations of users who are not represented in the present-day water market.

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[23] *See* H. VARIAN, MICROECONOMIC ANALYSIS 259 (1984).

[24] *See* R. LIND, *supra* note 17.

2. Public Goods

Some water uses display "public goods" traits. For example, some water uses are non-competitive (one use doesn't impede another use) and there is no effective means of exclusion from use (use admission can't be enforced).[25] Public goods traits were a common rationale for taxpayer subsidization of water projects particularly for any associated recreation and flood control benefits.[26] These types of justifications for public financial support of water projects appear to have lost considerable influence in recent years given increasing recreational congestion and the recognized ability to assess flood control charges for property which enjoys flood control protection.[27]

3. Natural Monopoly

The development of water supply and pollution treatment facilities often entails consideration of "natural monopolies" and economies of scale.[28] The least-cost scale of many water facilities is so large that entire regional markets are served. The financial requirements for construction require government involvement. An additional consideration is the "common carrier" concern, because water distribution systems, like highway and energy distribution systems, are not amenable to market competition because duplication would be an inefficient use of scarce investment capital.

The scale and financing considerations were relevant during the early stages of economic development in the United States, but are less so today. The best sites for large-scale water supply projects have already been developed.[29] Changes in technology, market, and finance conditions relevant to water supply and treatment have been so significant that the federal role has diminished considerably.[30] The common carrier argument, however, has a persistent relevance with respect to *distribution* systems.[31] Thus, water districts throughout the country that were established by state charters along with the federal reclamation and flood control projects inappropriately control such facilities.

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[25] *See* H. VARIAN, *supra* note 23, at 253.

[26] Two significant early works in this regard are O. ECKSTEIN, WATER RESOURCE DEVELOPMENT — THE ECONOMICS OF PROJECT EVALUATION (1965), and J. BAIN, R. CAVES & J. MARGOLIS, NORTHERN CALIFORNIA'S WATER INDUSTRY (1966).

[27] See discussion throughout U.S. WATER RESOURCES COUNCIL, ECONOMIC AND ENVIRONMENTAL PRINCIPLES AND GUIDELINES FOR WATER AND RELATED LAND RESOURCES IMPLEMENTATION STUDIES (U.S. Department of Interior, 1983).

[28] 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS ch. 4 (1970).

[29] *See* U.S. DEPARTMENT OF INTERIOR, *supra* note 12, at 2.

4. Equity

Finally, it is argued that creation of a market for water will ignore equity considerations. Markets are inherently calloused to the distribution of income, purchasing power, and access to resources. That claim cannot be denied, but its social significance applies to the working of all markets, not just those involving water resources.[32]

5. Government Ownership

The degree to which government ownership and control of water resources is justified is, to say the least, controversial. It can be, and is, argued that water markets frequently fail (or do not exist) because the conditions for failure are established and perpetuated by government agencies with their own agenda for control of the resource.[33] Indeed, if public agencies really want to create conditions conducive to the working of water markets, then the most important first step would be to establish clearly defined private property rights for units of both water supply and quality. Such a step would go a considerable way toward ameliorating the market failures caused by the public goods and natural monopoly characteristics of water. If properly applied, some of the externalities resulting from water use might be partially removed by this kind of reform by providing a mechanism for liability assessment, transfer of rights, and compensation for previously external effects.

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[30] R. SMITH, TROUBLED WATERS — FINANCING WATER IN THE WEST (Council of State Planning Agencies, 1984).

[31] The legal rationale for "common carriers" is outlined in 1 A. KAHN, *supra* note 26, at 5-7. The issue is becoming increasingly important in water allocation policies, as evidenced, for example, in 1986 legislation in California requiring water transfer conveyance facility use. Cal. Water Code §§ 1810-1814 (West Supp. 1988).

[32] *See* H. VARIAN, *supra* note 23, at 284.

[33] WATER RIGHTS — SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT (T. Anderson ed. 1983).

6. Water Rights Endowments and Distributional Equity

The only way that the establishment of private property rights to water resources can solve the equity problem is by redistributing (or for unallocated rights, distributing) water rights. This type of reform is likely to be resisted by those who now have rights to use, if not to sell, water. Nevertheless, in the many cases in which the actual establishment of water rights, both quantitative and qualitative, is still in question, dispute settlements could address equity concerns as a matter of policy. An important example involves the myriad of unsettled claims to water rights by numerous Native American tribes. Aside from the complex legal questions involved in tribal water rights based on treaties, Winters Doctrine,[34] aboriginal uses, and other issues,[35] it is clear that the allocation of property rights to water resource uses should, as a matter of equitable policy, give priority to Native American claims. The tribes should also have the right to sell or lease such rights as a source of revenue to insure their economic and cultural survival.[36] Establishment of equitable endowments of rights could apply in other circumstances as well, such as in the allocation of tradable water pollution rights in basins in the South in which communities of blacks and Hispanics have been exposed to disproportionate risks from water pollution.[37] Further, the competing constituencies often involved in water rights conflicts could be accomodated by considering distributional equity.

III. POLICY REFORMS

A. *The Private-Public Dichotomy*

As noted above, there has been a significant shift in demand for various water uses during the past several decades. There is now less demand for consumptive uses, particularly for agricultural production, and more demand for alternate uses such as recreation, drinking water quality, fisheries, and wildlife habitat. Policy reforms must address the manner in which private and public allocation systems can be adjusted in recognition of this shift in demand.

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[34] The Winters Doctrine derives from Winters v. United States, 207 U.S. 564 (1908), and establishes the legal basis for tribal rights to water for reservation lands based upon the "practicably irrigable acreage" criterion.

[35] For an excellent overview of Native American water issues, see AMERICAN INDIAN RESOURCES INSTITUTE, TRIBAL WATER MANAGEMENT HANDBOOK (1987).

[36] In a very restricted number of cases, this right has been recognized, but only as a result of a special Congressional act. *See, e.g.*, the Ak-Chin Indian Community Water Rights Act, Pub. L. No. 98-530, 28 Stat. 2698 (1984). This act provides specific allowances for water transfers for this southern Arizona tribal community. A proposal to allow similar water transfer options in the settlement of the claims of the Colorado Ute Tribe was recently opposed in Congress primarily by Lower Colorado water users.

[37] Tradable water pollution rights are discussed in Maloney & Yandle, *Building Markets for Tradable Pollution Rights*, in WATER RIGHTS, *supra* note 33, at 283.

While estimates of economic demand for alternative uses can be made,[38] it is difficult to measure the shift in demand over time in a quantitative manner. Acknowledgement of this shift, and pursuit of the needed policy reforms, must take place through the political process. Concerns that must be addressed include (1) the desire for reduction in the taxpayer burden and budget deficit, which is consistent with reduced federal subsidies to private, and perhaps public, water users; (2) the increased demand for non-consumptive uses; (3) decreasing the availability of water resources for inefficient uses resulting from a combination of market failures and ineffective management by public agencies; and (4) a public perception that government management of resources is often ineffective, and that private solutions should be facilitated where possible.

Water resources may be loosely placed into three classes ranging from inherently private uses to inherently public uses. There is a class of water uses which is inherently private, but which could be used more efficiently and with less environmental harm if certain reforms were undertaken. There is a second class of water uses, currently controlled by public agencies, which should be privatized because the rationale for public control is weak. Finally, a third class of water uses appear to require public control, or at least oversight, due to market failure problems. Which policies are appropriate to facilitate both private and public reallocation in water resources uses?

B. *Water Quantity*

Private uses involve both water quantity and quality considerations. Facilitating the voluntary buying and selling of water rights by private interests would accomplish a major portion of the quantitative reallocations for which there is an economic demand.[39] Several changes in federal water policies would promote such reallocations.

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[38] For an overview of nonmarket benefit valuation techniques, see A. FREEMAN, AIR AND WATER POLLUTION CONTROL — A BENEFIT-COST ASSESSMENT (1982).

1. Tradable Federal Reclamation Water Contracts and Conveyance

The U.S. Department of Interior should issue a generic policy statement on the transferability of contractual rights to reclamation water supplies.[40] The Department's current piecemeal approach is to respond to proposals for transfer when presented. Given the inherent conflict in asking reclamation contractors to open transfer discussions when many are unsure of their contractual rights with the United States, it is not surprising that there have been few proposals.[41]

One possible means of remedying this situation would be to issue shares in each federal reclamation project, and to allow leases or sales of such shares, which would determine rights to the project's water each year.[42] The U.S. Bureau of Reclamation would, after the initial issuance of shares, no longer be involved in the water contracting business. Instead, it would allocate the water from each project to the project's shareholders. Where conveyance outside federal reclamation areas was required by such transactions, the provision of such conveyance would be the responsibility of the transactors. However, federal and, where available, state conveyance facilities could be made available as common carriers. Such transportation services could be charged for and could be allocated by a system of priority rights to use.

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[39] There is a growing literature on this possibility. *See, e.g.*, WATER RIGHTS, *supra* note 33; Vaux & Howitt, *Managing Water Scarcity: An Evaluation of Interregional Transfers*, 20 WATER RESOURCES RES. 785 (1984); Howe, Schurmeier & Shaw, *Innovative Approaches to Water Allocation: The Potential for Water Markets*, 22 WATER RESOURCES RES. 439 (1986); Z. WILLEY, *supra* note 18.

[40] During the 1983-86 period, an internal U.S. Department of Interior working group attempted to design such a policy, which would have given reclamation water contractors clear signals regarding water transfer opportunities. The Department failed to release such a policy statement, and cautiously noted that "[a]lthough there continue to be opportunities to market existing water assets or products controlled by the Bureau, water marketing has taken on new meanings and has generated new opportunities. New policy issues also must be considered, such as sales of interim water, facilitating transfers among non-Federal entities, and leasing of project storage or conveyance capacity. These new opportunities offer a chance to break new ground, manage exisitng Reclamation assets, and to reexamine current policies and practices." DEPARTMENT OF THE INTERIOR, *supra* note 12, at 5.

[41] "Reclamation contractors" are organizations, usually irrigation or water districts, which are served water from federal water projects under contract with the U.S. Bureau of Reclamation. The terms of these contracts are negotiated under regulations promulgated by the Bureau under the Reclamation Act as amended in 1982. The right of reclamation water contractors to transfer water appears not to be precluded by federal law, although the Secretary of the Interior has approved those few cases in which such a transfer has actually occurred to users outside the boundaries of the reclamation project. *See* Roos-Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation*, 13 ECOLOGY L.Q. 773 (1987). Uncertainty with regard to transaction costs such as legal fees for negotiation with the Bureau and fear of retribution by Bureau employees opposed to water transfers appear to be an important obstacle to formulation of proposals for transfers.

2. No New Reclamation Projects

Changing conditions have destroyed the principal rationale underlying the Bureau of Reclamation's historic mission of new project planning and development.[43] As discussed earlier, the public goods and natural monopoly justifications for public water project development are no longer compelling reasons for such a mission. In addition, the Bureau's project planning procedures are devoid of economic rationality.[44] The Bureau should no longer have the mission of planning and/or constructing new water resource facilities of any kind.

3. Federal Flood Control and Hydroelectric Functions

A similar set of changes should be made for the water resources managed by the U.S. Army Corps of Engineers and the federal power authorities. The rights to flood protection within the Corps basin projects should be allocated by a share arrangement which could vary over time and result in subsequent variation in the Corps operation of relevant facilities. Federal hydropower projects, such as Bonneville, TVA, and individual facilities such as Hoover, could auction both short- and long-term rights to power. The existing configuration of contracts could become shares in the project's output, and could be traded accordingly. The federal power agencies' role would then become one of operating the facility, and allocating electrical output according to the market allocation of shares. Again, no new project planning or development by these federal agencies is appropriate or necessary.

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[42] For a discussion of how such share trading works within mutual irrigation companies, see *Just Rewards: Making Water Marketing Work for Local Interests*, WATER STRATEGIST, July 1987, at 1.

[43] "The Bureau's primary role as the developer of large federally financed agricultural projects is drawing to a close." DEPARTMENT OF THE INTERIOR, *supra* note 12, at 1.

[44] *See* Z. WILLEY, *supra* note 18.

C. *Water Quality*

1. Water Markets — Incentives for Pollution Control

Water quality would be improved by the measures mentioned above. Since the buying and selling of shares (particularly those of federal reclamation projects) would create an opportunity cost to all existing shareholders in the form of the share's sales price, water use for purposes such as irrigation would be subject to a new incentive for conservation. Avoided water uses, and hence income from the selling of shares, would in turn reduce polluted agricultural runoff. In effect, nonpoint source pollution controls, hailed in theory for over a decade under the Clean Water Act as "best management practices," could become the subject of real economic incentives for implementation by irrigators. As a result, the quality of water resources for uses which rely on agricultural return flows would be enhanced, and quantities of water conserved could be made available for such uses.

2. An Example — The Federal Waterfowl Refuges

An important current example of the need for reform in federal water policy is the contamination of federal waterfowl refuges by pollutants in drainage from federal reclamation irrigation project lands. The chemical and biological effects of this contamination are presently being documented in several western states in contamination studies by the U.S. Fish and Wildlife Service and Geological Survey.[45] For example, irrigation of lands on the west side of California's San Joaquin Valley (Westlands Water District) is the source of contamination in the waters of the Kesterson Wildlife Refuge. The quality of this drainage water could be improved by reducing on-farm water applications, which would significantly reduce leaching of trace elements such as selenium into the drainage runoff.[46] If a system of voluntary selling of Westlands Water District reclamation contract rights *outside* the district were in place, there would be a significant amount of water supply available for other uses, such as waterfowl refuges, along with a reduction in the trace element loading problem. Institutional barriers within the district and the Bureau of Reclamation, however, have effectively prevented this from occurring.

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[45] An overview can be found in U.S. FISH AND WILDLIFE SERVICE, CONTAMINANT ISSUES OF CONCERN — NATIONAL WILDLIFE REFUGES (1986).

[46] For an example of a westside irrigation district study which investigates this possibility empirically, see D. WICHELNS, D. NELSON, & T. WEAVER, FARM-LEVEL ANALYSIS OF IRRIGATED CROP PRODUCTION IN AREAS WITH SALINITY AND DRAINAGE PROBLEMS (U.S. Bureau of Reclamation Cooperative Agreement No. 7-FC-20-04090, 1988).

3. Tradable Discharge Permits

A second reform which would serve private and public interests in improved water quality is the institution of a system of economic incentives for water pollution control such as tradable permits. Tradable permit systems have been discussed extensively in the academic literature, and even implemented within several river basins in Europe.[47] However, the United States experience with such systems is very limited.[48] With the exception of some limited applications of tradable air pollution permits, U.S. federal pollution laws have relied primarily upon command-and-control approaches.[49] Under the command-and-control approach, regulatory agencies issue discharge permits, with pollution limits based on available control technologies. While this system has had beneficial effects during the past decade in controlling some conventional point sources of water pollution,[50] massive federal subsidies were expended through the EPA's Construction Grants Program to achieve these results. Moreover, existing approaches to point source control do not limit the total volume of discharges within a basin, providing little protection for the myriad of uses which rely on water quality. And finally, virtually no one would argue that the command-and-control, technology-based approach has had any significant effect in controlling the nonpoint water pollution sources.

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[47] An overview of tradable pollution permits can be found in Russell, *Controlled Trading of Pollution Permits*, 15 Envtl. Sci. & Tech. 1 (1981). For discussion of economic incentive systems applied to water pollution in Europe, see Brown & Johnson, *Pollution Control by Effluent Charges: It Works in the Federal Republic of Germany, Why Not in the U.S.*, 24 Nat. Resources J. 929 (1984); Harrison & Sewell, *Water Pollution Control By Agreement: The French System of Contracts*, 20 Nat. Resources J. 765 (1980).

[48] A simulation analysis of a system of permit trading, a version of which is now operating, on Wisconsin's Fox River can be found in O'Neill, *Transferable Discharge Permit Trading Under Varying Stream Conditions: A Simulation of Multiperiod Permit Market Performance on the Fox River, Wisconsin*, 19 Water Resources Res. 608 (1983). The U.S. Environmental Protection Agency has a pilot water pollution trading project for nonpoint sources in Colorado as described in Jaksch & Niedzialkowski, *Speeding Water Cleanup While Saving Money*, EPA J., October 1985, at 24.

[49] An excellent survey of federal environmental law and proposed reforms based on economic incentives can be found in Ackerman & Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 Colum. J. Envtl. L. 171 (1988).

[50] U.S. Environmental Protection Agency, National Water Quality Inventory — 1986 Report to Congress (EPA-440/4-87-008) (1987).

Nonpoint water pollution sources, particularly from agriculture, dispersed toxic sites, and urban runoff, constitute the major American water pollution problem. These pollutants impact both surface and ground water and their control remains to be effectively addressed. In the recent amendments to the Clean Water Act,[51] Congress recognized these problems, but did not provide an effective incentive mechanism for their resolution. Tradable permit systems, with a maximum allowable basinwide pollutant loading set by regulatory authorities, may offer the most feasible means of providing economic incentives to maintain water quality standards in an economically efficient manner.

A viable system of tradable permits presumes, as does any pollution control policy, that identification of polluters and monitoring and enforcement of permit terms are achievable. Given the cost and political difficulty of effective enforcement by government pollution control agencies, serious consideration of private enforcement alternatives is warranted. One possible means of making a system of tradable permits for nonpoint sources workable and politically acceptable would be to establish local institutions to manage the permit system. For example, agricultural drainage districts in the western states might be utilized to manage discharge permits for such pollutants as salinity and trace elements among member irrigation districts and individual farmers.[52] In the midwest, where sediments are a key problem, soil conservation districts might be utilized in a similar fashion. The incorporation of such local institutions into the tradable permit system would be an important element in establishing verifiable and enforceable conditions.

D. *Clarifying Federal Water Quality Policy*

The lack of clear economic incentives to control surface and ground water pollution in federal law, particularly in the reliance on "best available technology" in the Clean Water Act and in the

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[51] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 -1376 (1982 & Supp. III 1985).

[52] The concept of a regional drainage institution is now being discussed in California's San Joaquin Valley for the nine irrigation districts which contribute to salinity and trace element loads in the San Joaquin River.

Resource Conservation and Recovery Act,[53] and the current serious discussion of still more federal legislation to regulate groundwater indicate that federal water quality policy is in need of reforms which can actually achieve water quality goals. If a rational federal policy is the goal, then clarifying legislation is needed. Such legislation should be comprehensive with regard to federal water quality policies and controls. In amending sections of existing statutes, the following goals should provide guidance.

1. Tradable Permits, Basinwide Standards, and Revised Agency Roles

Tradable water pollution rights systems should be encouraged, not outlawed. It is time to recognize that the command-and-control approach has been at best a limited success in achieving water quality goals, and that environmental and health damages continue. The Environmental Protection Agency should have as a key mission, either within its own regional offices or by delegation to state agencies, the establishment of pollutant load ceilings by hydrologic basin which would, in turn, limit the number of tradable permits to be issued for that particular basin. State delegation is attractive because it provides a mechanism to incorporate differing regional conditions and concerns into implementation of basinwide water quality standards. One likely consequence of this is that some states will allow more pollution than others. Some federal constraints on such *variation* in pollution loadings may be appropriate, although some might argue that if a particular state wishes to become a pollution haven to attract industry, its citizens should have the right to make that choice.

It may be appropriate for EPA to coordinate activities of all federal agencies with particular water quality interests within an area or basin. For example, the U.S. Fish and Wildlife Service, an agency with very little authority, might be given the responsibility of establishing water quality standards for fish and wildlife in the aquatic systems, including wetlands and estuaries, of a given basin. Human health standards might continue to be set by the EPA, or perhaps by another health-related federal agency, such as the U.S. Public Health Service. The EPA's continuing responsibilities could include, in conjunction with federal scientific and research agencies such as the U.S. Geological Survey and the

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[53] *See* Ackerman & Stewart, *supra* note 49.

National Research Council, oversight of the periodic adjustment in these allowable ceilings based on scientific and economic information. Where tightening of standards seemed appropriate, public agencies or private interests could purchase and retire discharge permits to improve water quality in the basin.

2. Monitoring and Enforcement

Under these reforms, the EPA and the state agencies would no longer have to concern themselves with the technological and economic issues associated with the command-and-control approach to standard setting and permit issuance for point and nonpoint sources of water pollution. Identification, monitoring, and enforcement of the terms of permits, particularly for the nonpoint sources, would continue to be problems. Identification of sources is a combined research and data collection task which would benefit from a continuing federal role. Monitoring and enforcement, on the other hand, may be performed better by the private sector.

The key to controlling pollution from nonpoint sources is the establishment of workable rules governing the use of permits. In agriculture, for example, collecting information on actual discharges into surface and groundwater may be prohibitively expensive. Permit rules, therefore, may need to be based on observable but indirect measures which are related to actual discharges. For example, in implementing nonpoint controls for trace elements and salinity, permit terms could be based on amounts of irrigation water applied and estimates of consumptive use as indirect measures of polluted runoff and drainage.[54] In any event, once these permit rules have been established, there is no apparent reason why monitoring and enforcement could not be performed by private firms either on contract with public agencies or on behalf of other private interests affected adversely by the subject pollutants. Such private enforcement arrangements could provide a hedge against the tendency in federal budget deficit reduction efforts to cut enforcement expenditures by federal agencies such as the Environmental Protection Agency.

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[54] For an example of an empirical study of the relationship between irrigation water applications and drainage discharge rates, see D. WILCHENS, A. NELSON & T. WEAVER, *supra* note 44. For an overview of agricultural water pollution issues with special reference to California's Central Valley, see Willey, *Managing the Central Valley's Agricultural Salinity and Toxic Water Pollution Problems — Is There a Workable Scenario During the Next Investment Period?*, 2 APPLIED AGRIC. RES. 32 (1987).

3. Federal Statutory Conflicts

In establishing the framework for administering tradable permits systems, conflicts with and among the federal statutes must be removed. Existing statutes concerned with toxic substances focus on standard-setting;[55] clean-up and liability for existing toxic contamination sites;[56] and waste stream monitoring and toxic facility design, closure, and liability.[57] A number of proposals for groundwater regulation are currently being considered in Congress. It would be undesirable to complicate the situation further by passing new legislation targeted at groundwater only. Instead, groundwater issues should be incorporated along with revisions in the Clean Water Act into comprehensive federal water legislation. A federal role in the provision of technical information related to basin-specific water resources is warranted in such new legislation.

4. The Federal-State Relationship

The policies aimed at the control of groundwater contamination are the least coherent and developed of any federal water policies. The federal-state relationship, which is an important dimension of all water policies, due to the diversity and site-specificity of water problems, is extraordinarily critical in groundwater policies. If such policies are to be based on economic incentives such as tradable discharge permits rather than on traditional command-and-control regulatory approaches, then the federal-state relationship will have to be clearly defined.

State water laws have established rights to use water under appropriative, riparian, correlative, and other conditions. The concept of a water right provides the starting point from which tradable discharge permits could be established. The problem of property rights to groundwater must be solved within such a water rights framework before a tradable discharge permit system can be substituted for existing (and proposed) toxic legislation aimed at groundwater quality.

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[55] Federal Water Pollution Control Act, 33 U.S.C. §§ 1311-1330 (1982 & Supp. IV 1986); Safe Drinking Water Act, 42 U.S.C. §§ 300j-300j-3a (1982); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921-6925 (1982 & Supp. IV 1986).

[56] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9605-9607 (1982 & Supp. IV 1986).

[57] Resource Conservation and Recovery Act, *supra* note 55; Toxic Substances Control Act, 15 U.S.C. §§ 2603-2607 (1982 & Supp. IV 1986).

In some states, such as Nevada, this problem has already been addressed since groundwater rights have been "adjudicated." Groundwater pumping rights have been assigned to individual private and public interests, usually after an extensive adjudicatory process by state administrative agencies. In other states, such as California, most groundwater has not been adjudicated, although some individual basins (e.g. the San Fernando Basin in southern California) have been adjudicated, usually by special court proceedings. In cases in which groundwater rights have been adjudicated, the need for protective federal controls such as those in RCRA may not be appropriate. The property right which is implicit in the adjudicated right provides a private incentive to seek compensation for groundwater contamination liabilities which may arise. Although these private incentives for groundwater quality protection are strong, there are nevertheless significant transaction costs which the groundwater right holders must bear in order to enforce such protection. A federal research role in the provision of technical information related to source, dispersion, and impact of groundwater pollutants might again be useful.

In aquifers with "common property" status, regulatory structures for water quality protection are necessary. Given the site-specific nature of groundwater problems and management choices, state administration may be more appropriate. Such regulatory systems can be quite expensive, but the only clear alternative which eliminates the need for them is adjudication of groundwater rights, a process which has also proven to be quite expensive, involving lengthy judicial and/or administrative proceedings. The control of groundwater contaminants at the source also appears to require regulatory incentives. In short, there is no easy, low-cost, regulation-free solution to the groundwater contamination problem. Thus, a sensible strategy is to embark upon a long-term plan to develop a system of rights and liabilities for groundwater which will be similar to the public-private system of rights currently evolving for surface waters.

Water legislation containing an incentive provision requiring states to adjudicate groundwater rights in order to avoid federal controls would be a move in this direction. Each groundwater aquifer adjudication process could then occur within the context of the particular set of water resource demands extant in the aquifer's region or state. Subsequent issues of contamination and liability could be addressed through the resulting property rights allocation. Adjudication of groundwater rights in most areas would be a long-term process requiring as much as several decades. In the interim, state regulatory agencies could be used to (1) control groundwater contamination, and (2) oversee the adjudication process. Most states, particularly in the West, already have agencies which could oversee adjudications. In order to prevent the creation of permanent public bureaucracies while providing the interim regulatory function, state agencies with "sunset" provisions in their authorizing legislation could have the specific interim mission of controlling groundwater contamination until the adjudication processes are complete.

E. *Demand for Public Water Resources*

1. The Public-Private Interface

The above policy reforms are intended to facilitate the efficient allocation of water resources among private uses, impose necessary public constraints on those uses, and remove unjustified public roles in that allocation. In addition, the allocation of water resources among public uses, and the relationship between private and public uses needs to be addressed. There is, and will continue to be, competition for both quantity and quality of water among various uses. It is apparent that the ownership status of at least some types of water resources may never by fully clarified, and that the public-private dichotomy will be with us for some time. At present, conflicts between public and private uses are addressed by a combination of regulatory agencies and court proceedings. Conflicts among public uses are increasingly frequent. For example, attempts to divert upstream flows to waterfowl wetland habitats may harm downstream fish habitats and recreational uses. Allocations among these uses are made in tenuous fashion involving a combination of regulatory procedures and the politics of the relevant public agencies. Is there a constructive way to clarify this allocative process, utilizing some measure of market incentives?

2. Acquisitions and Public Rights to Water Resources

The two key concepts in addressing these issues are acquisition and liability. Acquisition is the securing of water rights, including rights to water quality, for public uses. In most states, there are no rights for public uses other than those imposed by regulatory or court proceedings through mechanisms such as instream flows and "public trust."[58] In several western states there is some legislative and administrative movement toward establishing rights to instream flows for nonconsumptive uses such as fisheries.[59] The establishment of instream flows is in essence the establishment of a water right for public (and sometimes private) uses, although it remains to be seen whether these newly formed instream flow standards will survive during dry years when there is direct competition with senior appropriative rights, most of which are for private uses.

Beyond this type of regulatory approach to protection of public uses, there is the larger question of what priority public uses are ultimately to have in the mix of private and public uses prevalent in most of the nation's water basins. It is consistent with the concept of water markets that public users ought to be able to acquire rights in much the same manner as any other purchaser within a basin or regional market. In attempting to preserve public uses, public acquisition from willing sellers has the added attraction of providing government water agencies with an alternative to the involuntary taking of existing water rights. Public purchase of water rights can be seen as a market analogue to the implementation of the public trust doctrine within the existing structure of appropriative rights.

Creating a market for water rights along with a willingness among the appropriate public agencies to acquire rights is probably an easier task than providing the financial capability for these agencies to make such acquisitions. The question is whether the public users, represented by these agencies, have the ability to pay to secure water rights. Revenues from user fees can provide funds for public agencies which could enable them to purchase water rights.[60] These fees, however, are unlikely to be adequate because of the impracticality of charging all users. A significant additional source of revenues for public acquisitions may be the assessment of liability for damages to public rights.

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[58] A succinct discussion of the public trust doctrine can be found in *Water Policy In the Balance: Water Development and Environmental Interests in the Era of the Public Trust Doctrine*, WATER STRATEGIST n.d. vol. 1 no. 1, at 1. Perhaps the most significant judicial finding with regard to public trust rights to water resources came in the California Supreme Court's 1983 decision that the public trust doctrine modifies the diversions by the Los Angeles Department of Water and Power from the Mono Lake Basin. National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

[59] A summary is provided in WATER EFFICIENCY WORKING GROUP, WESTERN GOVERNORS' ASSOCIATION, WATER EFFICIENCY: OPPORTUNITIES FOR ACTION REPORT TO THE WESTERN GOVERNORS 82-93 (1987).

3. Liability and Compensation

It is often the case that both the appropriation and consumptive use of freshwater and pollution discharge result in damages to other competing uses. There are several legal avenues of redress available to private users. They involve property, nuisance, and general tort law. Analogous experience exists in suits for compensation for damages to public rights.[61] Fines for failure to comply with regulatory standards are sometimes sought as part of public enforcement actions. Litigation by public agencies seeking damage compensation does occur, and Department of Interior regulations provide rules for assessing damages for injury to, destruction of, or loss of natural resources from oil or hazardous substance releases.[62] These kinds of efforts are a step in the right direction, but a general policy of vigorously securing damages for harm caused to public waters would complement the acquisition of public water rights.

A controlled policy by federal and state water agencies to identify pollution law violations and to seek compensation for damages to public water rights would help to maintain the integrity of those rights. In addition, the revenues generated by such compensation could be placed in trust funds dedicated solely to the acquisition of additional water rights for public uses—acquisitions made from willing sellers.

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[60] An example of this type of relationship between user fees and habitat maintenance is the use of duck stamp fees charged to hunters for wetland enhancement and maintanence in several states. Similar arrangements, instituted by state fish and game authorities, use fishing license fees to support hatchery breeding and other fisheries enhancement programs.

[61] Perhaps the most frequent instance of such public action has been by state fish and game authorities seeking compensation from water polluters for damages to fish and bird populations.

[62] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 301(c), 42 U.S.C. § 9613(c) (1982 & Supp. IV 1986), requires that natural resource damage assessment regulations be developed.

4. Liabilities of Public Agencies

It is important to note that the parties liable for damage would include not only private water users, but also public agencies. Examples abound. Damage payments could be sought from the U.S. Department of Agriculture as a result of its agricultural commodity support programs, from the U.S. Forest Service for its timber harvesting programs, from the U.S. Department of Interior for its reclamation irrigation projects, from the U.S. Army Corps of Engineers for its flood control projects, from the federal power authorities for the operation of their hydroelectric facilities, and even from the U.S. Department of Defense for the operation of the many military installations which result in damages to public water resources. This internal cost accounting among the federal agencies would not only provide a source of revenue for water rights acquisitions for public uses, but also would provide economic incentives for the agencies to reduce the damages to water resources which result from their programs and policies. At the very least, it would make explicit the hidden costs in many government programs.

IV. ASSESSMENT OF THE OPPOSITION TO POLICY REFORM POTENTIALS

Most, if not all, of the policy reforms advocated in this paper follow directly from the hypotheses set out in the beginning of the paper. Demand for public water uses (both in quantity and quality) is rising; supply is contracting. Existing federal regulatory and subsidy policies are increasingly coming under criticism. Alternatives which deliver improved environmental quality at a reasonable economic cost and which are consistent with American traditions favoring voluntarism and disfavoring government coercion seem to have a promising future. Political coalitions which span the spectrum from left to right, Democrat to Republican, are possible, as the reforms suggested here are delivered in a spirit of bi-partisan or non-partisan advocacy.

Political realism indicates, however, that the reforms advocated here will not come easily. Entrenched interests will contest these policy reforms for a variety of reasons.

A. *Mission-Oriented Agencies and Private Sector Beneficiaries*

The most obvious opposition will come from the mission-oriented agencies, such as the U.S. Bureau of Reclamation, whose time we believe has passed. Reforms which would make new government-backed and subsidized projects less likely and which would assess those agencies with liability for the resource damages they cause threaten bureaucrats whose careers are dependent on such projects. These agencies have allies in Congress and in the private sector who do not pay the full price for the benefits which the projects deliver.

These potential opponents in the private sector have been able to exploit public water resources at little or no cost to themselves and might, under the proposed reforms, find themselves liable for pollution they are causing or find their expectations of further government subsidies frustrated. Ultimately some private political opposition is inevitable, but a significant part of this potential opposition can be avoided by making the reallocation of water supplies voluntary and by encouraging least cost pollution control through incentive mechanisms.

Still other government agencies and bureaucrats who have powers over allocation of water (like their cousins who control shares of a private market) will behave like threatened competitors and will seek government and public support when policies are proffered that threaten to take away some of their control. Unlike private market shares, the perceived loss is not monetary, but it is real nevertheless. Defense of existing government-based allocations will be based not only on the "natural monopoly" rationale discussed above, but also on self-perceived beliefs that existing agencies have developed greater knowledge and perspective on the proper allocation of water than a more dispersed market could ever develop.

That this belief flies directly in the face of the dominant cultural commitment to the merits of free enterprise and market allocation will be either ignored or disguised by counter-attacks on incentive-based schemes as being only quasi-markets or inadequate second-best solutions. Yet, while most of the reforms postulated above would not create markets by an economist's pure definition (as government control remains a major element both in the allocation of water supply and in the regulation of its quality), they certainly approximate the market paradigm much better than the current government control and regulatory schemes they would replace.

B. *Government Regulatory Bureaucracies*

More subtle opposition will come from other government agencies and bureaucrats whose interest is not government subsidy, but government control or power. Many regulators—including even regulators who frequently are loathe to apply strong regulatory pressure upon those whom they are legally supposed to control—will often jump to the defense of their prerogatives and will oppose alternative incentive-oriented schemes, even though they may accomplish the same goals at a lower financial and institutional cost.

Finally, another group of government agencies and bureaucrats whose missions have been pro-environment are also potential opponents of reform. This is partly because they fear change will threaten the few prerogatives they have and partly because they are not confident that the political support exists for them to take action on behalf of the resources they are required to protect.

C. *Command and Control Environmentalists*

The last general category of opponent is perhaps the most disturbing. A large cadre of professional advocates for environmental betterment has grown up around the command-and-control structure of the major pollution laws. In many cases, they know the intracacies of those laws as well or better than the regulators who administer them and the industries they regulate. These advocates naturally will be very slow to accept new ideas that may render much of their expertise obsolete, especially when they can rightfully claim that experience with many of the alternatives proposed in this paper is sparse indeed.

A related group of pro-environment advocates opposes market-oriented allocation schemes on similar grounds and suggests instead more aggressive advocacy for public rights on the part of government regulators and courts. This group favors the politicization of resource and pollution policy and attempts to rely on an aroused citizenry, sustained media attention and hoped for favorable electoral outcomes to offset the imbalance in financial resources among environmentalists, government, and industry. Protecting some environmental resources by anything less than a major confrontation is somehow thought deplorable; opponents are viewed as enemies; and the world is divided into those who wear white and black hats. Such a perspective leaves little room for reliance on a profit motive to accomplish environmental goals.

D. *The Challenge: A Difficult Reform Package to Deliver*

This sketch of the array of potential opponents to the proposed reforms is not intended to imply that all opposition to or criticism of these proposals is self-serving and non-substantive. No doubt many fair criticisms are possible. This delineation of potential opponents, however, does demonstrate that reform will be elusive even if the hypotheses regarding the increasing demand for environmental quality and the general support for libertarian outcomes are correct. Even with the best strategy for public advocacy, coalition building, and alliance with potentially benefited private and public interests, reform will likely come slowly in the face of the obstacles identified above. This comports with our experience to date, but we continue to believe that history is on the side of the reform agenda, and that precedent-setting initiatives will ultimately lead to the implementation of such reforms.

V. SUMMARY

Several principles for the reform of federal water policy can be distilled from this discussion. First, federal agencies should no longer plan and develop new water resource supply, flood control, energy, or pollution control projects. Second, general federal taxpayer revenues should no longer support the allocation of water resources to any private and to many public uses. Third, for existing federal facilities, tradable shares in the project should form the basis for the allocation of the project's water resources, with the relevant federal agency operating the project accordingly. Fourth, federal water conveyance facilities should be managed as common carriers, with tradable rights to their use available to private and public users as part of water transfer opportunities.

Fifth, federal water quality policy is disjointed, and new comprehensive legislation is needed to formulate a meaningful and effective policy. Of utmost concern in such legislation are (1) the initiation of tradable discharge permit systems as the most effective means of controlling nonpoint sources of pollution, and

(2) the need to condition federal groundwater quality policy upon the willingness of state water authorities to establish clear priority rights systems for groundwater. Sixth, public water uses should be narrowly defined to include only those types of uses that are not amenable to market allocation. Such public uses should be secured by the acquisition of water rights, for quantity, quality, or both, from willing sellers.

Seventh, compensation for water resource damages should be sought from both private and public water users, and the resulting revenues should be dedicated to the acquisition of water rights for legitimate public uses. While there are existing legal and regulatory procedures for seeking such compensation for at least some types of damages, comprehensive federal water legislation should include specific procedures for seeking such compensation, and for subsequent acquisitions by relevant public water agencies.

ATTACHMENT 2

American Ideas

Water Marketing

P. F. BENTLEY

A Deal That Might Save A Sierra Gem

Negotiators are trying to sustain Mono Lake by buying irrigation water from unused fields

BY RICHARD CONNIFF

Get your hackles up, California. We are here to discuss that choke-thy-neighbor word, water. Here being a quintessentially innocuous looking and provocative setting, the Los Angeles water intercept on Lee Vining Creek in the eastern Sierras. On a brilliant winter afternoon, knee-deep snow covers the intake pond behind a small concrete dam, and a Steller's jay swoops among the evergreens. Mount Dana, lacking only an Ansel Adams moon, is lit up crisply against a cloudless sky. And in the background (the sticking point), there is the sound of rushing water.

GALEN ROWELL—MOUNTAIN LIGHT

Mono Lake's tufa towers loom over a slowly shrinking body of water

"We're trying to figure out a philosophy to rehabilitate things over the next 100 years."

By recent court order, some of the creek's water pours over a narrow spillway and meanders seven miles down its ancient route to Mono Lake. "There's probably 5 c.f.s. flowing in there," a water activist remarks in the technical shorthand (c.f.s. meaning cubic feet per second) that characterizes California water talk.

But since 1941, most of the Mono Basin's mountain water has been disappearing from here and from three other streams down a tube that leads about 225 miles south to Los Angeles. The result, as bumper stickers, outraged postcards to the Governor, and sober scientific studies have all amply declared, is that this country's oldest lake, and one of its most unusual, is being destroyed. Even the Los Angeles department of water and power concedes that the Mono Lake ecosystem could collapse. "We feel comfortable that we have 20 years before it's going to happen," says David Babb, a staff naturalist. There is time for more studies. But for now, he says, the department has no way to replace its Mono water, 100,000 acre-feet a year, 17% of the city's supply. The Mono Lake Committee, a courtroom adversary, says it sees an "incremental unraveling" happening at Mono right now. It wants the diversion reduced to 30,000 acre-feet to stabilize the lake at a safe level.

What to do? An acre-foot is the amount of water it would take to flood an acre one foot deep, and if you can find 70,000 of them lying around for the taking in Southern California, you can probably change your name to Yahweh and begin collecting burnt offerings. No obvious replacement source presented itself in the Mono Lake dispute until recently, when an economist named Zach Willey suggested that the city and the environmentalists get together to buy water from farmers on the western side of the Sierras in California's vast central valley.

Water marketing, first debated in the 1970s, was an appealing idea: farmers use about 85% of California's water, and because they get it from state and federal water projects at subsidized rates, they tend to squander it. An acre-foot that costs Southern California urbanites $230 may cost farmers as little as $10, so even adding in the heavy cost of transporting the water in the state's vast aqueduct system, there is room for both sides to benefit from resale of unneeded irrigation allotments. The idea had two minor drawbacks: many California farmers would sooner spread salt on their fields than surrender an acre-foot of the water they regard as their birthright, and second, Willey's employer, the Environmental Defense Fund, has a reputation for fighting the new water projects coveted by a lot of farmers. But Willey and E.D.F. offered to find farmers willing to sell, and the Mono Lake litigants agreed to pay for the search.

Thus at 5:30 on a recent morning, Willey and a partner, E.D.F. lawyer Tom Graff, headed from their Oakland office down Highway 5 to dicker with irrigation districts on the west side of the San Joaquin Valley. An odd pair: Willey, somewhere over 6 ft. 5 in. in his cowboy boots, lean, green-eyed and with an easy grin; Graff, short and with a squared-off boxer's nose, but unpugnacious. As environmentalists go, they speak softly and strangely: California water distribution suffers under misguided socialist precepts, they argue. What it needs is fewer bureaucrats and more capitalists. Turn water into a commodity people can buy or sell, and the market will soon straighten out inefficient ways of using the stuff.

"We've had 100 years of development, and the environment's been kicked around pretty bad," Willey says. "We're trying to figure out a philosophy to rehabilitate things over the next 100 years. You're not going to do it by wholesale taking away of resources from industry and farmers, or they're going to wind up litigating you for the next 100 years. You're going to do it through a system of incentives." His approach is to "go out and make some deals" with the people who control water rights—the farmers.

Willey, himself a product of the central valley, has spent years scouting irrigation districts. "It's taken a decade of learning local customs to get where we can have this little discussion," he says of the morning's talks. "There are still some groups in the valley that wouldn't sit in the same room with us." E.D.F. hopes to entice two of the more progressive irrigation districts, Firebaugh and Broadview, to risk heresy and agree to a 10,000-acre-foot pilot project. "The party line is that nobody takes water from agriculture. That's what they're going against."

The farmers who've come out to meet Willey are neither heretics nor hayseeds but businessmen in a carpeted irrigation-district boardroom. They hem and haw in their own argot. They are worried, for instance, about load-flow relationships: if the government sets stringent new standards on selenium in their runoff, they may need to dilute it with the very water Willey is proposing to buy. Life is terribly uncertain. The regulatory agencies, they observe, "just agreed that water runs downhill about two months ago." The farmers also have this uneasy feeling that the environmentalists want them to save water by shutting down farmland.

Willey reads the unspoken cue; they are imagining *Owens Valley: The Sequel*, in which Los Angeles, having glommed up water and put farmers out of business in the now infamous valley south of Mono Basin, casts a thirsty eye their way. He tries to reassure them. The idea is to spread the water-marketing deals around to avoid a concentrated effect on any single farming area. No one is telling farmers to take land out of production or move to the city. A textbook negotiator, Willey subtly points up benefits that the farmers would rather temporarily overlook: Wouldn't the income from water marketing help pay for new irrigation methods that save water? Could be. Isn't that the sort of thing farmers are looking at anyway, because it can also boost production? Maybe so.

Both irrigation districts are firm on one point. The bid of $60 an acre-foot that Willey has presented on behalf of the Mono Lake litigants will cut no deals. One farmer states the proposition from Willey's point of view: "You get the price up, and if farm prices aren't so good, you're going to get other districts saying, 'Look what those fellows are doing over there.' " A price upwards of $125 might begin to stir their interest. Then they grimace and stare at their thumbs as if to say they honestly wished they could do better.

All this is about as expected, Willey says on the drive home. If he can get all sides to settle on a price, his next job may be more difficult. In its last days, the Reagan Administration stated it had no objections to water marketing (in a memo written by an Assistant Secretary now handling water-project bonds at Drexel Burnham Lambert). But other voices may object to the idea that farmers who receive subsidized water for crops, and further subsidies not to grow those crops, should profit handsomely on the sale of the subsidized water. Willey argues that the profits will be going to produce new public benefits: irrigation systems that use less water and produce less pollution. A Mono County businessman suggests that the sale of water rights ought to be regulated to prevent profiteering. But here Willey hews to the free-market line: even if the price per acre-foot starts out high, he says, competition will drive it down to a fair level as other irrigation districts try to get in on the action. Beyond that, someone has to pick up the bill for the replacement water. Los Angeles has agreed to pay part of the cost of the pilot project. E.D.F. has committed itself to raising the remainder, partly by lobbying the state and the U.S. Forest Service, which has declared Mono Lake a National Forest Scenic Area. If tax dollars are unavailable, says Graff from the backseat, E.D.F. may propose turning the lake over to a private trust and setting up a tollbooth.

He is only half kidding. "The idea that the postcard-writing public should pay as well as write cards is not an easy one for preservationists to swallow," Graff concedes. But "if there was more of a willingness to pay for maintaining the environment, we wouldn't have to rely on bureaucratic whim." It is evident that Willey and Graff believe in their neocapitalist approach. The bottom line then naturally presents itself: Gentlemen, what do we get for our money?

Pursue that question downstream from the Los Angeles intercept a day or two after the bargaining session, and find Mono Lake looking a little depleted, like an old man who has got too small for the collar of his best shirt. It has shrunk from more than 80 sq. mi. in area to about 60. But in the warm months, 40,000 California gulls still nest on the volcanic islands, and migratory grebe and phalaropes turn the lake into an ornithological stew. The tufa towers produced by geological turmoil under the surface still stand, gnarled spires made of a material that Mark Twain likened to "inferior mortar dried hard": here a Giacometti sculpture, there a bust of Richard Milhous Nixon. Nature's freakish pranks. To the west, snow billows off the high ridge of the Sierras as the sun drops behind. The light catches on jagged volcanic peaks along the south shore of the lake. It turns the clusters of tufa white against the leaden water. Everything is silent, and there is a sickle moon overhead (not quite Ansel Adams, but getting there). The light changes from red to wine dark to a milky bruised blue, and the mountains fade into the sky. In a visitor's register nearby, someone has scribbled a note: *"Es ist wunderbar hier. Danke, Amerika."* ■

Testimony of the Shoshone Indian Tribe Before The Senate Select Committee on Indian Affairs

April 6, 1989

Mr. Chairman, members of the Committee, my name is John Washakie and I am Chairman of the Shoshone Tribe of the Wind River Reservation of Wyoming. With me is the Tribe's legal counsel, Susan Williams. We appreciate the opportunity to testify on Indian water rights, a matter of the greatest importance to the Tribe.

Let me go to the heart of the Tribe's views on Indian water rights today. This hearing is most timely, as the Tribe on April 25, 1989 will be defending in the United States Supreme Court an award by the Wyoming Supreme Court of almost 500,000 acre feet per year of water to the Shoshone and Arapahoe Tribes with an 1868 priority date, based on the practicably irrigable acreage on the Reservation. The State's stated reasons for its attack on the award are representative, we believe, of concerns nationwide about Indians receiving the water which was reserved by and for them when their Reservations were created.

We think the attack, however, is misguided, because the State is not in the forum which can offer the most satisfactory remedy for all concerned. Specifically, the non-Indians have sued the Tribes in our case because they believe that if the Tribes are awarded any water, non-Indians will be left with no water for the farms and other activities they have labored long and hard to operate. The Tribes, assert, however, that rather than trying to press in the courts novel and unworkable theories for reducing Indian water awards, the states and the tribes should be working diligently, calmly and jointly to assess the nature and extent of any water shortages resulting from the Indians using their water awards.

Based on this information, strategically-placed new water storage can be designed and constructed to provide water to all persons on or near the Reservation who can use water beneficially. We fully appreciate that the enormously expensive water projects authorized in the past for non-Indians are no longer politically realistic. But, we are firmly convinced that water supplies can be expanded significantly and efficiently without the same enormous expenditure of funds. We also believe that the Congress will continue its practice in recent history of funding Indian water rights settlements as part of any effort to minimize dislocation of current water use~~s~~rs. Congress must continue this support, as we believe negotiated settlements of these questions can be far more attractive than litigation.

With respect to using their water award, the Wind River Tribes have chosen the path of accommodation and reasonableness to try to avoid to the maximum extent possible injury to existing water users. The State, only, I must add, after litigation yielded to the Tribes a water award of significant size, also has entered into discussions with the Tribes to try to avoid injury to existing users. As a result, we have reached an historic interim agreement with the State that addresses not only water but also tax matters that have created difficulty between the State and Tribes. Next summer, in the event of a drought, the Tribes have agreed to share any shortages with junior water users. In exchange, the Tribes will receive a state tax abatement and cash needed to cover any crop losses that result from waiving an 1868 call next summer. We are well into this effort but are far from final resolution. To continue, we must have Congress' assurance that it will: (1) appropriate funds to expand water supplies on the Reservations, and (2) confirm the parties' authority to devote water to its highest and best uses. These remedies are compelled by Congress' apparently conflicting water commitments at the turn of this century first to the Indians and later to the non-Indian settlers, by the history of water development on our Reservation, by the critical need for Indian water issues to be resolved by negotiation, and by powerful market forces in the West. Let me explain each of these factors in turn.

Mr. Chairman, the Wind River Reservation is the second largest in the country in size and resident Indian population, with approximately 2 million acres, 4,000 Arapahoe residents and 2,500 Shoshone residents. The Shoshone and later the Arapahoes both were settled on the Wind River Reservation. Most residents now are involved in agriculture. The Reservation was established in 1868 and early this century, the federal government announced plans to develop water supply and delivery systems on the Reservation for the Tribes' members. Thereafter, the United States encouraged non-Indians to buy and to farm certain Reservation tracts even after the U.S. Supreme Court in 1908 held that sufficient water was reserved for the Indians when the Reservation was set aside. Not surprisingly, the plans for Indian irrigation systems, as a consequence, never were realized fully. Instead, over the years the United States has emphasized water supply and delivery systems that benefit primarily the non-Indians. Today, the Bureau of Indian Affairs ("BIA") estimates almost $5.4 million is needed just to complete the Indian water delivery systems on the Reservation.

Significantly, none of the federal laws that entitled non-Indians to settle Reservation lands abrogated the Indians' earlier water rights. The federal practice, however, has been not only to emphasize development that favors non-Indians, but also to manage irrigation projects so that non-Indians' fields were served first. The Tribes' senior water award for the first time now can help ensure that the Indians realize fully the benefits of the Reservation which was set aside for them. But the water delivery systems needed to bring the water to its users finally must be completed, and any new construction of water storage that may be needed for other uses must be identified to minimize dislocation of current users.

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Last summer illustrates the benefits of such efforts by the State and Tribes, and the Indians' sincere efforts to respond sensibly to the complexities on the Reservation. The Crowheart irrigation project is one of ~~two~~ three BIA-operated reservoirs, and one of 6 reservoirs on the Reservation. Last summer, the Indian fields that have an 1868 award from the Wyoming Supreme Court were going dry while the non-Indians fields with later priority dates were soaked. The Tribes stepped forward and indicated that, if necessary, they would call their senior rights so that the Indian fields would not be burned up.

The non-Indians panicked and litigation seemed inevitable. Instead, the Tribes and the State's scientists and engineers sat down and worked out a management plan that was endorsed by the BIA and which resulted in water being made available to all fields. Of course, the Tribe, with its senior rights, had no legal reason to do this. But, the Tribes are demonstrably concerned that their Reservation citizens not be harmed by essentially federal oversights. Thus, they devoted substantial resources toward avoiding that harm, and succeeded in doing so. Although this immediate resolution may not be possible in every case, the Crowheart experience, we believe, is an important foundation for positive discussions between the State and Tribes on Indian water matters that may arise in the future.

The Wind River Tribes face many thorny challenges as they put their water to use in order to create employment.

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The United States and non-Indians must appreciate these challenges and help us work to solve them. The only alternative is to fight in court, where so many issues simply cannot effectively be addressed, such as monitoring, enforcement, and ensuring water is devoted to its highest and best use, while sound conservation principles are observed.

Let me highlight only the principal challenges ahead. First, as a result of the irrigation activities on our Reservation, many valuable fisheries are destroyed or are near destruction. We had some of the most beautiful and abundant fishing in this country. That fishing provides a livelihood for many. Water is not just an economic commodity, but it also makes possible certain cultural and religious activities important to many members of the Shoshone Tribe. Unfortunately, the Bureau of Reclamation has taken a dim view of fisheries protection on the Reservation, particularly at Bull Lake, even though the BIA view is that the United States has a trust responsibility to protect fish and game on the Reservation. Reclamation is more concerned with meeting its water delivery contracts with non-Indians. The Tribes believe joint efforts to design strategically placed new storage can address any conflicts over water as between agriculture and fisheries.

Another difficult task will be our effort to decide how best to use that portion of the water award that is not presently being used. We sense pressures from even members of Congress to use that water only for agriculture on the

Reservation. No other water user is so restricted, and this position simply is unfair. With our 70% unemployment rate, we must have the flexibility to devote that water to its highest and best use. Be assured no decision ever would be made in this respect that has the effect of wasting the Reservation's water resources.

A third task is to assess the nature and extent of any water scarcity that may result from the Indians devoting the unused water to particular activities other than fisheries. Carefully placed and designed water storage again will be critical to alleviate any identified shortages.

Finally, the Tribes increasingly have become aware of long ignored water quality problems on the Reservation that will burden both Indians and non-Indians. The State lacks jurisdiction to address directly these problems on the Reservation and the U.S. Environmental Protection Agency appears to have done a wholly inadequate job of safeguarding the Reservation's precious water supplies. The Tribes have created the Wind River Environmental Quality Commission to begin this summer the testing needed to obtain baseline data so that protection strategies can be formulated as soon as possible. State cooperation may well be very helpful.

Mr. Chairman, in all of these areas the Tribes, the United States, and the State could fight in court and never address all the important issues. The Tribes instead call for reasoned, scientifically-based joint efforts. But, if the Tribe's sovereign integrity, and water and other property rights are not respected, we will be forced, once again, to defend them in Court. Let us all get on with development for the benefit of our regional economies, and let us work together to ensure that the precious resources we have today will be available for our children and our grandchildren tomorrow.

PREPARED STATEMENT OF ELLIOTT BOOTH

Thank you Mr. Chairman for this opportunity to testify concerning Indian water policy. My name is Elliott Booth and I am Vice-Chairman of the Colorado River Indian Tribes. With me is Mr. William G. Lavell, our Tribal Attorney.

The Colorado River Indian Reservation was established in 1865 by Act of Congress (Act of March 3, 1865; 135 Stat. 559). Since then it has been added to by Executive Orders dated November 22, 1873, November 16, 1874, May 15, 1876 and November 22, 1915, so that now the total reservation consists of 268,691 acres, 225,995 in Arizona and 42,696 in California. The reservation stradles the Colorado River for approximately forty-five miles.

IRRIGATION PROJECT

The first matter we want you to consider is that a reserved water right is of potential value only if it is not put to use, and potential value does not help us overcome our poverty and unemployment problems. A brief review of the history of our reservation and its irrigation project will demonstrate this.

Prior to the establishment of the reservation, the Colorado River Valley was occupied between the area of Ehrenberg-Blythe on the south to Needles and Fort Mojave on the north by Mohave Indians and some Chemehuevi. These tribes lived by farming the lands along the river that were flooded in the spring. In years when there was sufficient flooding the crops were good and in other years there was famine.

In 1864 Charles Poston, then Superintendent of Indian Affairs for Arizona, recommended that a reservation be created at the present location of the Colorado River Indian Reservation in order to persuade the Mohave and Chemehuevi to occupy a smaller area because of encroachment on their lands by non-Indians. He also recommended that the federal government fund the diversion and canal works necessary to provide irrigated farming for the Indians so that they could live on a smaller area of land. This promise by the federal government to provide irrigated farming was relied on by the Mohave and Chemehuevi Indians who moved onto the reservation. This promise has never been fulfilled.

In 1867 the first appropriation for the irrigations works was made. By 1900 only 500 acres were under irrigation, by 1940--10,000 acres; and by 1958--35,000 acres. Between 1867 and 1958 the total amount of lands that were to be subjugated to irrigation were variously estimated to be between 100,000 acres and 150,000 acres.

In 1963, the Tribe was adjudicated rights to water sufficient to irrigate 107,588 acres of land. Thereafter, since the federal government did not appropriate funds for irrigating the additional 72,500 acres, the Tribe entered a series of long-term (25 year) development leases for the development of approximately 50,000 acres of lands to irrigated farming. In order to do this the tribe had to lease at an average price of $22.00 per acre per year. The current market value of irrigated lands on the reservation is approximately $122.00 per acre and it had been much higher before the recent drop in the agriculture economy. This brought the total irrigated acres to approximately 85,000.

In 1987 the Bureau of Indian Affairs contracted to conduct a rehabilitation and betterment assessment for the

Colorado River Indian Reservation's irrigation system. A first draft report was released in the Fall of 1988 and the final draft is being completed at this time. This report indicates that the extension of the existing irrigation system to serve an additional 22,500 acres together with certain rehabilitation of the existing system has a cost/benefit ratio of 1.6. The total cost of the project is estimated at 92.7 million dollars.

The Tribe has already contributed the cost of developing the 50,000 acres developed under the development leases. We are now asking that the Congress fund the development of the additional 22,500 acres so that the irrigation project can be completed as promised. We have asked for an add-on of $2,455,000 for FY 1990 to begin the engineering work necessary to finally complete our project more then 120 years after its start. For all of those 120 years we have had problems of poverty and unemployment which were not helped by the potential value of our reserved water rights.

WATER MARKETING

Proper development of our Reservation requires that we have maximum flexibility in putting our water and other resources to the best beneficial use to achieve the purposes of the Reservation. The primary purpose of the Reservation was and is to provide a homeland for Indians settled on the Reservation. While the measure of our water right was based on the number of practicably irrigable acres, it is clear that the use of the water is not limited to the purpose of agriculture. We have plans to continue the development of recreation resources along the river, to provide some additional light industry and perhaps some mining operations on the reservation, all of which will use some amounts of water. In addition, we are considering such things as aquaculture for the raising of fish and other ventures. In the past year we built a state-of-the-art cotton gin on the reservation in partnership with Anderson-Clayton Company. It began operations last November.

As can be seen from a review of the economic development efforts on Indian reservations throughout the United States in the past twenty-five years there have been several problems standing in the way. One has been the legal impediments to financing necessary for any development. This has been largely overcome with substantial help from Congress in establishing programs such as loan guarantee and insurance.

Another constraint has been the availability of venture capital to proceed with development. Without venture capital it has been necessary for Indian tribes, including this one, to bring in partners with the venture capital when willing partners can be found. This requires us to give up a large portion of ownership, profits and control of any particular venture. Cases in point on our reservation are the development leases mentioned above and a lease which we signed several years ago for development of a gypsum mine and a wallboard plant. In that lease we were to receive only rents and royalties in the beginning years with an option to purchase the business in increments during the course of the lease. We were forced to do this at that time because we did not have the capital to go out and borrow the money necessary to finance it ourselves. Since the original lessee did not perform we are considering the possibility of building the plant and developing the mine site as a tribal venture and hiring management to run it. In order to finance this kind of venture we need capital.

It is our plan to raise this capital by some limited water marketing. We have been reviewing this matter for several years at the Tribal Council level. Among the possibilities that we have explored has been the marketing of what is known as a dry-year option to the lessee. This would give the lessee such as cities in central and southern Arizona, what they need--an assured supply of water in the shortage years, and would give us what we need--capital at this time to proceed with our developments. The same would be true of any marketing we would do in California, since we have adjudicated water rights in both states.

This brings us to the question--do we have authority to market water for off-reservation use. Attached as Attachment "A" is a copy of a paper delivered at the Third Annual Water Marketing Conference at the University of Denver College of Law on October 6, 1988 by our tribal attorney which discusses the issues and possible solutions. For the purposes of this hearing it is sufficient that we state the following:

1. We have adjudicated water rights and, therefore, should not be asked to accept artificial constraints on the use of our water as a condition to marketing authority. Tribes who are negotiating a settlement of their water rights may wish to make certain concessions in order to get a firm quantification of those rights. We have already taken our lumps in Court, and should not be asked to make further concessions.

2. We believe the United States has a trust responsibility to secure, protect and develop the water rights of all Indian tribes, and particularly those who have adjudicated rights. This includes the right to all reasonable and beneficial uses of such water, including water marketing for off-reservation use. While the basis for determination of an Indian reserved water right is different from a state appropriative water right, the bundle of rights received is substantially the same--the right to put the water to any reasonable and beneficial use. We believe that the federal courts have so defined

> this right. The only possible constraint on the exercise of this right is the Non-Intercourse Act (25 USC 177). It should be noted that this Act was enacted as a shield to protect Indian property rights, not as a sword to cut them back.

In order to further the goal of self-determination as set forth in the Indian Self-Determination Act such a program of flexibility in the use of water and other resources is essential for tribes to become more self-sufficient as the Congress has asked us to do.

PROBLEMS WITH THE DEPARTMENT OF AGRICULTURE

Unfortunately, in using our water for agriculture we have run into some difficulties with the U.S. Department of Agriculture in the recent past. These difficulties are more fully set forth in the correspondence attached but I will summarize them as follows:

(1) In 1987 the Tribe leased approximately 20,000 acres of off-reservation land and combined it with reservation land in the cotton program in order to put an additional 7,000 acres of reservation lands in cotton farming for that year. The Department of Agriculture ruled that this did not constitute a farming unit, and we appealed that ruling and won. Thereafter, the Department of Agriculture changed its regulations so that the exemption from payment limitations applying generally to Indian lands was limited to Indian lands located on the Reservation, and lands leased by the Tribe off-reservation were specifically excluded from the operation of the Indian exemption as set forth in 7 CFR 1497.22. This problem is more fully set forth in the correspondence attached as Attachment "B."

(2) On March 24, 1989, we received a phone call from the State Program Specialist of ASCS who advised us that, since one of our 130 lessees was not in compliance in the partnership operation of its farm, the entire 1.8 million dollar cotton subsidy payment which the Tribe would get under three separate farming operations conducted by the Tribe on approximately 16,000 acres of reservation land would not be paid. Instead, we would be entitled to only one $50,000 payment. This news was given to us right in the middle of the planting season. We were faced with either going ahead and continuing our planting under the program and risk loosing practically all the profit for this year or changing our planting program in the middle of the season. Fortunately, we were able to change some of the planting from short staple cotton in the program to long staple cotton out of the program and thereby reduce the risk involved. But the problem still remains not only for us but for every Indian reservation that both farms some of its own land and leases other land out.

This is another attempt by Department of Agriculture to negate the Indian exeception to payment limitations. This exemption was established to encourage agriculture on Indian reservations and help Indian tribes to become self-sufficient. It should be noted that a similar exemption applies to state school lands. Obviously, this ruling imposes business risks that neither the tribe, nor any other farmer can live with.

We have sent a request for an opinion on this issue to the Department of Agriculture through the Interior Department pursuant to the Agreement in Principle between the two departments dated January 20, 1988, copy of which is attached. We are in hopes that we will get a favorable response from Department of Agriculture when they sit down with the Interior Department and work out this matter pursuant to the Agreement in Principle. If not, we can assure you that we will be coming to the Congress for correction of what we consider an unlawful attempt to negate the

Indian exception contained in the present regulations. Correspondence regarding this issue is attached as Attachment "C."

CONCLUSION

Attached as Attachment "D" is an excerpt from F. Cohen, Handbook of Federal Indian Law, 596-598 (1982) which clearly sets forth the responsibility of the United States in regard to Indian water rights and its failure to adequately discharge that responsibility. The following quote summarizes the points:

> "The United States, in its role as guardian of Indian lands, is charged with the responsibility of administering trust property for the sole use and benefit of its Indian wards."
>
> "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservation it set aside for them is one of the sorrier chapters."
>
> "The legal right to water does not automatically bring with it the capital investment necessary to realize its economic benefits. Irrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indians. Consequently, most Indian tribes have not been able to utilize their full entitlement of water."

In order that the United States might better administer the trust property of Indians and Indian tribes we suggest the following:

1. Complete irrigation projects on all Indian trust lands as their water rights allow as the top

priority before development of any other water projects. Since we have been waiting for completion of our project for more than 120 years, longer by far than any other project, Indian or non-Indian, we do not believe it unreasonable to ask that we be given first priority.

2. Allow maximum flexibility to Indian tribes in developing their trust property including the right to market water for off-reservation use. This right should not be encumbered by any restraints other than restraints contained in the general leasing law (25 USC 415) which are designed to protect the trust property involved and the interests of Indians and Indian tribes therein.

3. Make certain that all departments of the government understand and act on the duties imposed by the responsibility of the United States in administering the trust property of Indians and Indian tribes. This will require continuous oversight and corrective legislation where necessary.

Thank you for this opportunity to present our testimony. We will be happy to answer any questions.

Attachments

ATTACHMENT "A"

Should Indian Waters Be Marketed Off-Reservation

William G. Lavell, Tribal Attorney
Colorado River Indian Tribes
Route 1, Box 23-B
Parker, Arizona 85344

Steve Shupe has done an excellent outline of this topic which is included in the materials for this conference. For a more thorough discussion, I suggest Story, Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose; 76 Cal. Law Rev. 179 (1988); and F. Cohen Handbook of Federal Indian Law, 575-604 (1982).

For purposes of this discussion, I do not make any distinction between reserved water rights of Indian tribes and any other water rights obtained from other sources. The point I will try to make is that all water rights should be marketable subject only to the restraints imposed by the applicable laws of the jurisdiction creating those rights.

I. Why not market Indian waters for off-reservation use?

A. Some base their objection on the Non-Intercourse Act (25 U.S.C. 177) which prohibits transfers of interest in Indian land except as authorized by Congress. Since the term "land" includes water rights and Congress has not given any blanket authority for the leasing of Indian water rights as such, these persons argue that Indian water rights cannot be marketed for use off the reservation. There are several answers to that objection:

1. The obvious answer is that the tribe can go to Congress and get special authority to lease the water rights for off-reservation use. This has been done in one instance where the Tohono O'Odham (Papago) Nation got Congressional approval for the marketing of its water entitlements for off-reservation use in the Southern Arizona Water Rights Settlement Act of 1982 (P.L. 97-293). Other proposed authorizations for off-reservation marketing are included in bills pending in Congress regarding the San Luis Rey reservation in California (S.795), the Colorado River Ute Indian water settlement in Colorado (S.1415) and the Salt River Pima Maricopa Indian Community Settlement Bill in Arizona (H.R.4102). All of these bills were the result of negotiations between the Indian tribes and various water users in the areas affected. Each settlement agreement provides for a method of water marketing acceptable to the parties to the agreement.

2. Whether or not 25 U.S.C. 415 authorizes leasing of Indian water rights for off-reservation use has not been decided by the courts. Tribes' would argue that the authority to lease the whole, i.e. both

land and water rights, includes the authority to lease each of the parts separately. There is some support for this. Several transactions involving off-reservation use of Indian water have been approved by the Department of Interior without special Congressional authorization. In both the Central Utah Project Deferral Agreement in Utah and the Gila River-Kennecott Copper Company Deferral Agreement in Arizona the tribes agreed to defer their prior rights to the water for a period of time in favor of a junior user in return for payment of monetary compensation and other consideration.

B. The basic issue here is whether or not the water right is severable from the land. In 1964 the Solicitor's Office issued an opinion approving the leasing of land on the Colorado River Indian Reservation for the purpose of creating a residential subdivision and using thereon the water rights appurtenant to other lands on the reservation. (1 Op. Sol. 1930). In state water law this bridge was crossed many years ago. This leads us to the question underlying this entire topic: why should Indian water rights be treated any differently from non-Indian water rights in respect to marketing?

Apparently the Metropolitan Water District of Southern California agrees that Indian water rights can be marketed for off-reservation use. In 1987, MWD negotiated with three Indian Tribes on the Colorado River for the off-reservation use of a part of their water rights in the Colorado River. This negotiation was an attempt by the parties to settle pending litigation regarding ownership of lands on the three reservations. The negotiations were not successful at that time and the case is now before the Supreme Court on an issue not directly involving water rights.

The Solicitor's Office of the Interior Department in a 1983 letter stated its belief that Indian water rights were marketable for off-reservation use, but that such marketing would be subject to authorization by the Congress.

C. Others argue that off-reservation use of Indian water would adversely impact the persons presently using that water either by forcing them to pay for the use or by allocating the use to another entity. Concerning the second objection that it might cause a re-allocation of the use--I would answer that this happens every day in water transactions throughout the western states where junior right holders buy senior rights for the sole purpose of gaining a prior position. Once again the question, why should Indian water rights be treated differently? Congressman Nighthorse Campbell has suggested a solution to this problem; he proposes that the current user of the water be given a right of first refusal.

The objection that the present water user might have pay for it is wishful thinking at best. Unfortunately many Indian tribes are not now using all of their water rights. As a consequence junior right holders are using this water. Some argue that, under these circumstances, the Indian tribe should be required to put the water to a beneficial use on the reservation before it could be marketed for off-reservation use. Isn't marketing a beneficial use in non-Indian transactions? Once again the question, why should Indian water rights be treated differently? Furthermore, to require the use of the water on reservation first would add to the cost of the water if and when the tribe decided to market it for off-reservation use. The answer to the objection of not wanting to pay for the water is simply that the market should prevail.

D. Another objection to marketing of Indian water for off-reservation use is that it would somehow interfere with the "law of the river". This argument is used mainly in connection with the Colorado River. Any comprehensive discussion of the law of the Colorado River would be the subject of at least a three day seminar. Some of the elements to be considered are the Colorado River Compact, the Boulder Canyon Project Act, California Seven Party Agreement, various water delivery contracts, the Mexican Water Treaty, the Upper

Colorado River Basin Compact, the Colorado River Storage Project Act, the decrees in Arizona v. California, the Colorado River Basin Project Act, the Filling Criteria and the Operating Criteria. Do not let this list frighten you. An equally complex list of issues and parties confronted the parties who negotiated the Salt River Pim-Maricopa Community Settlement Bill. However, they worked through it to an agreement acceptable by all. Several basic principles will help in reaching any agreement: first, Indian reserved water rights are governed by federal, not state law; second, the five Indian tribes on the lower Colorado River have present perfected rights under Arizona v. California; and third, the water delivery contracts on the lower Colorado River provide that the United States is not obligated to deliver water under the contracts when for any reason such delivery would interfere with satisfaction of present perfected rights. All of these constraints on the use of the waters of the Colorado River can either be worked out in connection with an individual or area-wide agreement or act of Congress or, in the absence of agreement, by litigation in relation to a specific transaction. Most communities will find it beneficial to works out an agreement rather than to litigate.

II. Why should Indian Water be Marketed for Off-Reservation Use?

A. Congress has expressed its policy as encouraging economic development, self-determination and self-sufficiency on Indian reservations (Indian Self-Determination Act, P.L. 93-638). In addition, the present administration has expressed similar policy objectives in the President's Indian Policy Statement of January 24, 1983. The Indian tribes themselves were the motivating force in Congress passing the Indian Self-Determination Act. The leasing of Indian water rights would give a source of revenue which could be used to bring about economic development and self-sufficiency on Indian reservations.

B. The September 1988 Water Market Update reports efforts in Nevada and Texas where regional water planning uses water marketing as a means of providing the water where it is most needed. Wouldn't it be foolish to eliminate what is often a major water source in a given region from participation in any scheme designed to achieve this end? Once again the question: why should Indian water rights be treated any differently?

C. Sound public policy has for many years discouraged restraints on alienation. The restraints imposed on alienation of Indian lands by the

Non-Intercourse Act were intended to protect the Indians, not punish them.

III. Conclusion

The theme of this Third Annual Conference on Water Marketing is: The Move to Innovation. The Solicitor of the Interior Department has set the example by stating that that department supports the marketability of Indian water rights for off-reservation use. In several places state and local interests and Indian tribes have negotiated settlement agreements concerning the water rights of the tribes. Most agreements include a provision for marketing for off-reservation use. Traditionally, states have worked against Indian water rights. Why don't we do something innovative and abandon this policy? Why don't we follow the example of the Solicitor and those states that have worked out Indian water rights settlements and sit down with the Indian tribes and attempt to settle problems involving Indian water rights including leasing of Indian rights for off-reservation use?

ATTACHMENT "B"

COLORADO RIVER INDIAN TRIBES
Colorado River Indian Reservation
ROUTE 1 BOX 23-B
TELEPHONE (602) 669-9211
PARKER ARIZONA 85344

September 8, 1988

The Honorable Dennis DeConcini
328 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

On August 5, 1988 the Department of Agriculture published its new regulations regarding payment limitations in the Agriculture Stabilization Conservation Service (Fed. Reg. Vol. 53, No. 151 Part 29552, et. seq.). Unfortunately they included the regulation which makes Indian tribal ventures eligible only on a discretionary basis and only with respect to land which is owned or held in trust for the tribe. Lands leased by Indian tribal ventures are expressly excluded. This change in the existing regulation was the subject of your letter of June 23, 1988 to the Honorable Milton Hertz, Administrator, Agricultural Stabilization and Conservation Service (a copy of which is enclosed). Also enclosed is the copy of your letter of October 30, 1987 to the Honorable Richard W. Goldberg, Deputy Under Secretary for International Affairs and Commodity Programs, regarding the appeal of the Colorado River Indian Tribes on an adverse ruling under the previous regulations. As we advised you in our letter of July 22, 1988, we were successful in that appeal (a copy also enclosed).

Unfortunately, the August 5th action of the USDA puts the Tribe in the position of having to reevaluate its CRIT Farms IV farming venture. Our present lease of the 14,000 acres in McMullen Valley from the City of Phoenix expires at the end of this calendar year. If these regulations remain as published on August 5, 1988, we will not be able to renew our lease with the City of Phoenix since the venture will not be sufficiently profitable. We consider this a sad state of affairs where an Indian tribe and a large city are denied the benefits of a mutually profitable farming venture; apparently, because certain people in Agriculture took it upon themselves to undo the favorable ruling we received in our appeal. We find nothing in the 1987 Agriculture Reconciliation Act which mandated or even authorized this change in the regulations. In fact, we find the actions of USDA to be contrary to federal laws and policies intended to promote tribal economic development.

We request that you take whatever legislative action you can to reinstate the old regulation regarding Indian tribes.

Sincerely yours,

COLORADO RIVER INDIAN TRIBES

Elliott L. Booth

Anthony Drennan, Sr.
Chairman, Tribal Council

Enclosures

IDENTICAL LETTER ALSO SENT TO:

The Honorable John McCain

BARBARA A. MIKULSKI, MARYLAND
HARRY REID, NEVADA
WARREN RUDMAN, NEW HAMPSHIRE
PETE V. DOMENICI, NEW MEXICO
CHARLES E. GRASSLEY, IOWA
DON NICKLES, OKLAHOMA
FRANCIS J. SULLIVAN, STAFF DIRECTOR
J. KEITH KENNEDY, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

June 23, 1988

The Honorable Milton Hertz
Administrator, Agricultural Stabilization
  and Conservation Service
United States Department of Agriculture
Independence Avenue at 14th Street, S.W.
Washington, D.C. 20250

Dear Mr. Hertz:

On October 30, 1987, we wrote to Deputy Under Secretary of Agriculture Goldberg expressing our deep concern over a ruling by the Arizona State Office of the Agricultural Stablization and Conservation Service. That ruling denied the Colorado River Indian Tribes the right to participate in the cotton program administered by the ASCS, by refusing to treat certain off-reservation lands, leased by the tribes, as a single farming unit along with the Tribes' trust lands.

Fortunately, on February 11, 1988, the Deputy Administrator for State and County Operations, following an administrative hearing, reversed the determination of the Arizona State ASCS Office and held that the Tribes' leased and trust lands should be combined as a single farming unit. This determination permitted the Tribes to participate in the ASCS cotton program and saved a major Indian venture.

We have now learned that a provision of the rules recently proposed by the Department of Agriculture pursuant to Subtitle C of the Agricultural Reconciliation Act of 1987 would wipe out the favorable effect of the February 11, 1988 determination regarding the Colorado River Indian Tribes. This provision would also severely jeopardize similar efforts by American Indians to foster economic development and achieve tribal self sufficiency.

Under the regulations currently in effect (7 CFR Section 795.2(d)), the payment limitation applicable to other farming ventures "shall not be applicable to payments made to Indian tribal ventures" where a responsible official of either the Bureau of Indian Affairs or the particular Indian tribal council certifies that no more than the program payment limitation would accrue directly or indirectly to any individual Indian and the State ASC Committee reviews and approves the exemption.

By contrast, the proposed new rule, which is set forth in the April 6, 1988 Federal Register at page 11484, would drastically limit this long standing exemption designed to encourage Indian economic development. The proposed new rule provides, at proposed Section 1497.22 of 7 CFR, that payments "may be made" in excess of the applicable payment limitation provision, but only "with respect to land which is owned and not rented or otherwise acquired by an Indian tribal venture..."

Thus, the proposed new rule would make payments for Indian tribal ventures in excess of the payment limitation discretionary, rather than mandatory, where properly certified by the BIA or the tribal council. Additionally, it would take away such payments completely with respect to any land, such as the vast percentage of the land involved in the Colorado River Indian Tribes' venture approved on February 11, 1988, which is leased rather than owned by the Indian tribe.

To our knowledge, nothing in the Agricultural Reconciliation Act of 1987, or the legislative history of that Act, mandates, authorizes, or even suggests the need for the proposed new rule regarding Indian tribal ventures. The 1987 Act was designed to correct specific abuses in the various deficiency payment and land diversion payment programs that have been administered by the ASCS. It did not constitute Congressional authorization to make sweeping revisions that would drastically alter long-standing rules which did not contribute to those abuses.

At no time during the consideration of this legislation did the Congress, the GAO, or the Department of Agriculture mention Indian tribal ventures, whether on leased lands or otherwise, as an area of actual or potential abuse. To use the 1987 Act as the the basis to eliminate benefits to American Indians that were never intended to be affected, in our view, is an improper use of the Department's rule-making authority.

The proposed rule, in our view, directly contravenes the Federal Government's responsibility to native Americans. This Congress has a policy of promoting Indian economic development. The Administration has consistently sought to strengthen the economic position of American Indians, as evidenced as recently as the January 20, 1988 Agreement in Principle between the Department of Agriculture and the Department of the Interior.

The Honorable Milton Hertz
June 23, 1988
Page 3

In conclusion, we vigorously object to the proposed Section 1497.22 of 7 CFR and request that the provisions of existing Section 795.2(d) of 7 CFR remain in effect and be inserted in its place. Nothing in the 1987 Act authorizes or requires the proposed new rule. It would have a devastating impact on the efforts of American Indians to promote economic development and achieve economic self-sufficiency through projects such as that undertaken by the Colorado River Indian Tribes.

We strongly urge you to consider the impact of the proposed rule on American Indians. Your earliest reply will be greatly appreciated.

Sincerely,

Dennis DeConcini
DENNIS DeCONCINI
United States Senator

John McCain
JOHN McCAIN
United States Senator

DDC/lsi

BOB STUMP
3D DISTRICT, ARIZONA

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Congress of the United States
House of Representatives
Washington, DC 20515

ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON RESEARCH
AND DEVELOPMENT
SUBCOMMITTEE ON INVESTIGATIONS
DEFENSE POLICY PANEL

VETERANS AFFAIRS COMMITTEE
SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS,
RANKING MINORITY MEMBER
SUBCOMMITTEE ON HOSPITALS
AND HEALTH CARE

October 30, 1987

Honorable Richard W. Goldberg
Deputy Under Secretary for International
Affairs and Commodity Programs
United States Department of Agriculture
12th Street and Jefferson Drive, S.W.
Washington, D.C. 20250

Dear Mr. Goldberg:

We are writing to express our deep concern regarding a ruling by the Arizona State Office of the Agricultural Stabilization and Conservation Service that would, if not reversed by the Deputy Administrator for State and County Operations, substantially threaten the viability of a new farming venture of our constituent, the Colorado River Indian Tribes, and jeopardize the efforts of the Tribes to become economically self-sufficient and reduce their long-term dependence of the federal government.

Earlier this year, with the informal encouragement of members of the La Paz County ASCS Committee, the Tribes obtained $10 million in private financing and entered into agreements to lease some 20,000 acres of off-reservation fee lands. Under these arrangements, the Tribes will be able to farm not only portions of the leased lands, but also over 7,000 acres of extremely fertile on-reservation trust lands that otherwise would have had to remain idle. We understand that this venture, known as CRIT Farms IV, has already created some 150 new jobs in Western Arizona and is estimated to result in some $40 million in economic activity in the affected areas. Given the fact that the productive use of their trust lands represents the principal source of income to support the Tribes' governmental operations, the economic success of this venture is of critical importance to the Tribes.

The Arizona State ASCS Office has ruled, however, that because all of the labor and equipment of CRIT Farms IV was not physically moved from tract to tract, the farming operation does not qualify as a "single farming unit," and hence is ineligible to receive payments under the cotton program administered by the ASCS.

Honorable Richard W. Goldberg
Page Two

In our view, the ruling by the Arizona State ASCS Office is not only unreasonable, but would call into doubt the manner in which farms in Arizona and across the United States have operated for years. Moreover, we understand that the Tribes' legal counsel has been advised by both the Appeals Office and the Freedom of Information Office of the ASCS that there have been no decisions at the national ASCS level applying or interpreting the "single farming unit" regulation.

We understand that a hearing on the Tribes' appeal from the decision of the Arizona State ASCS Office is scheduled for November 5, 1987. We strongly urge that the Department of Agriculture carefully review this matter and grant the Tribes the right to participate in the ASCS cotton program for this important venture. We believe such a result not only is justified by the merits of the CRIT IV Farms venture, but also is particularly warranted in light of the obligation and trust responsibility of each agency of the United States to help protect tribal self-government and promote economic self-sufficiency among native Americans.

Sincerely,

Dennis DeConcini
Dennis DeConcini
United States Senator

John McCain
John McCain
United States Senator

Bob Stump
Bob Stump
United States Congressman

ATTACHMENT "C"

COLORADO RIVER INDIAN TRIBES
Colorado River Indian Reservation
ROUTE 1, BOX 23-B
TELEPHONE (602) 669-9211
PARKER ARIZONA 85344

March 27, 1989

The Honorable Jim Kolbe
U.S. House of Representatives
1222 Longworth House Office Building
Washington, DC 20515-0305

Dear Sir:

The Colorado River Indian Tribes ("Tribe") is requesting your assistance regarding a new Department of Agriculture administrative interpretation that will have devastating effects on Indian agricultural operations. I wrote to you last fall regarding the Colorado River Indian Tribes' ("Tribe") concerns regarding the new payment limitations regulation promulgated by the Department of Agriculture. 53 Fed. Reg. 29552. Those regulations modified the Indian payment limitation requirements for Indian tribes in a manner that made Indian tribal ventures eligible only on a discretionary bases and only with respect to land which is owned or held in trust for a tribe. While those regulations as written had a significant negative impact on our Tribe's farming operations, the Department's new interpretation of those regulations could wipe out the entire anticipated profit from any tribe's farm operations.

The regulations provide that for land owned or held in trust for an Indian tribe the payment limitation may be exceeded as long as no payment in excess of such limitation accrues to any individual Indian. For example, our Tribe would be entitled to approximately two million dollars in payments for the coming farming season. The Tribe includes this anticipated income when it plans its farming operations. The Department has interpreted its regulations in a manner that would nullify the effect of the payment limitation provisions that pertain to Indian tribes. If any lessee of tribal lands is determined not to comply with regulatory requirements that pertain to a lessee's internal business operations, that person is combined with all the tribally farmed lands. Once combined with the tribal lands, the lessee and the tribe are limited to one payment. In the case of our Tribe, if one lessee is found not comply in whatever degree, the Tribe and the lessee would be automatically combined without their consent and the Tribe would experience a two million dollar revenue shortfall. These revenues go directly to provide tribal services such as police, fire, social programs and education.

The Tribe operates four separate farms with a total of 10,395 acres in production with crops that qualify for subsidy programs. The these farms are operated as separate and distinct entities. These farm units were not established to maximize subsidy payments. The effect of USDA's interpretation is to ignore the reality of these separate farms. USDA would treat them as one farm and combine them with a lessee creating a combination that violates USDA's own regulations.

The Tribe can find nothing in any law or the regulations themselves that require or even lead to such a conclusion. In fact, even though the interpretation is being enforced against tribes, the Tribe has not been able to obtain any written documentation of interpretation of the regulations as applied. The unreasonableness of such an interpretation is further evidenced by the fact that the Tribe has no means to prevent such an event from occurring. There are approximately 130 lessees on the reservation, any one of whom could cause the Tribe to forfit its subsidy payments. The Tribe does not control the internal business operations of its lessees and even if it could the Department of Agriculture would only have to find one lessee that the Department determined did not meet its standards to wipe out any benefit to which the Tribe may be entitled. The Tribe is in compliance with the regulatory requirements and none of its lessees share in the benefit of the payment limitation exemption of the Tribe. The Department's interpretation, however, would penalize the Tribe for the lessees failure to comply. In contrast, the lessees partners, if the comply, would still receive their separate payments under the program. Therefore, the effect is that the Department is interpreting Indian tribes out of the agriculture programs because the risks of participating are so enormous.

As you are aware, many of the lands reserved to tribes were set aside, in part, to promote agriculture. In addition, Indian tribes were exempted from the payment limitations to promote tribal economic development. The Department of Agriculture in the last several years has taken actions to limit the participation of Tribes under these programs. These actions where taken without consultation with the Bureau of Indian Affairs in contravention of the January 20, 1988 Agreement in Principle between the Department of Agriculture and the Department of Interior. This most recent action if left in place will remove tribes which farm from participation in any agriculture programs which involve any type of price support or subsidy payments from the federal government. The Tribe finds nothing in the 1987 Agriculture Reconciliation Act to mandate the regulatory changes that are being interpreted with such devastating results. This makes the Department's interpretation that much more egregious. In fact, the Tribe finds the actions of the Department to be contrary to federal laws and policies intended to promote tribal economic development.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Daniel Eddy Jr.

Daniel Eddy, Jr.
Chairman, Tribal Council

COLORADO RIVER INDIAN TRIBES
Colorado River Indian Reservation
ROUTE 1, BOX 23-B
TELEPHONE (602) 669-9211
PARKER, ARIZONA 85344

April 3, 1989

In reply,
refer to ________

Patrick Ragsdale
Acting Assistant Secretary
Bureau of Indian Affairs
Room 4160
18th and C Streets, N.W.
Washington, DC 20240

Dear Mr. Ragsdale:

The Colorado River Indian Tribes ("Tribe") has been made aware of an interpretation of the recently promulgated Department of Agriculture ("USDA") regulations pertaining to payment limitations that has a potentially devastating impact on the agricultural economies of Indian reservations. The regulations at issue are the payment limitations adopted by the Department of Agriculture on August 5, 1988 and published in volume 53 of the Federal Register at page 29552. Due to the severe consequences this interpretation, as described below, will have for all Indian tribes which engage in agriculture and participate in federal agriculture programs, the Tribe is requesting that you present this issue to the USDA pursuant to the Agreement in Principle Between U.S. Department of the Interior and U.S. Department of Agriculture entered into on January 20, 1988 ("Agreement"). The Agreement provides that the departments: "in recognition of their respective responsibilities, enter into this agreement as a foundation for their endeavors in promoting the objectives of meeting the needs of American Indians. Through this agreement, USDI and USDA will work in partnership to improve the delivery of programs and services to better meet the needs of American Indians." The goal of the Tribe is that through the cooperative efforts of both federal agencies this issue can be resolved in a manner that recognizes tribal concerns.

This issue came to the attention of the Tribe on Friday morning March 24, 1989. At that time John Schumacher, an Associate Tribal Attorney, was speaking with the State Program Specialist of the Arizona State ASCS Office concerning a question the Tribe had raised regarding the application of these regulations to lands leased and farmed by the Tribe off the reservation. After discussion of that question, the State Program Specialist informed the attorney that he had received an answer to a second question. The Tribe was unaware that the resolution of any other issues concerning the ASCS program were pending. The Tribe was then informed that if a lessee of the Tribe failed to meet the requirements of the cash rent tenant provision in this ASCS regulation, the lessee would be combined with the Tribe and the Tribe would be limited to one payment, i.e., a maximum of $50,000. In following up on this issue, the Tribe was advised that afternoon that one lessee's partnership was out of compliance, and that, if such lessee did not come into compliance, the non-complying partner would be combined with the Tribe and the Tribe limited to one payment. That lessee is currently meeting the qualifications, but the potential that there may be another lessee that falls out of compliance requires final resolution of this issue.

The payment limitation regulations were adopted pursuant to Sections 1001 through 1001C of the Food Security Act of 1985, as amended. The statute was most recently amended in December of 1987 by the Agriculture Reconciliation Act of 1987, Pub.L. No. 100-203 (the "1987 Act"). The current statutory provisions were enacted to address the concern that some producers were trying to avoid the $50,000 limit on payments to individual producers by reorganizing their farming operations to qualify for additional payments. GAO Report RCED-87-176 Farm Payments - Basic Changes Needed to Avoid Abuse of the $50,000 Payment Limit, July 1987. The 1987 Act was designed to correct specific abuses in the various deficiency payment and land diversion payment programs that have been administered by the Agriculture Stabilization and Conservation Service ("ASCS"). To our knowledge, nothing in the 1987 Act, or the legislative history of the 1987 Act, mandates, authorizes, or even suggests the conclusion reached by the USDA regarding Indian tribal ventures. At no time during the consideration of this legislation did the Congress, GAO, or the USDA mention tribal ventures, Indian tribes, or the manner in which they farm or lease, as an area of actual or potential abuse. To use the 1987 Act and the regulations promulgated thereunder as the basis to eliminate benefits to American Indians that were never intended to be affected is, in our view, an improper use of the USDA's authority to interpret its regulations.

The regulations provide that for lands owned or held in trust for an Indian tribe, the payment limitation may be exceeded as long as no payment in excess of such limitation accrues to any individual Indian, including the individual's spouse and minor children. 7 C.F.R. § 1497.22. For example, our Tribe operates three farms each of which is a distinct entity and wholly owned by the Tribe. The Tribe is eligible to receive a maximum of 1,900 payments based on the number of households, provided that no payment in excess of the limitation accrues directly or indirectly to an individual Indian. The actual number of payments which the tribal venture would be entitled to receive in the short staple cotton program is 36.17 payments, since the calculation of the payments is based on the acreage planted to a crop and the requirements of the particular agriculture program. This would have resulted in anticipated payment of 1.8 million dollars.

The regulations also contain a provision that pertains to cash rent tenants. 7 C.F.R § 1497.16. A person or entity which leases land from a tribe is considered a cash rent tenant by the USDA. With respect to cash rent tenants, the regulations provide that unless the tenant provides either "active personal labor and capital, land or equipment," or "active management and equipment" the tenant is considered as the same person with the landlord. A landlord is defined as any "person who rents or leases farmland to another person." 7 C.F.R. 719.2(m).

USDA has indicated that in applying these provisions on Indian reservations the regulations will be interpreted in a manner that could limit a tribe to one $50,000 payment instead of the multiple payments provided for under § 1497.22. Our Tribe farms a portion of its own land at three farming locations and also leases some of its land for cash. Under the proposed USDA interpretation, the Tribe faces the distinct possibility that it will only receive one payment. This would occur if one of the lessees of the Tribe should be determined by the USDA not to comply with the cash rent tenant provisions. That lessee would then be combined with all of the lands which the tribe farms, i.e., all three farming locations, irrespective of how significant that lessee's operations are to the total farming operations of the Tribe, with the effect of limiting the Tribe to one payment.

In practical terms, if this interpretation is not altered it will have devastating consequences for Indian agriculture. For example, the Tribe had anticipated planting 7,800 acres in short staple cotton and signing up that acreage in the agriculture deficiency payment program. The Tribe had initially made the business decision to plant that crop and participate in the programs based on its anticipation that it was entitled to receive 36.17 payments under the program, which translates into a potential payment of 1.8 million dollars. This decision was based upon the provisions of § 1497.22, the current market price of the crop and other risk factors pertaining to making a reasonable business decision.

At the present time, the Tribe also leases land to 130 lessees whose lease terms range from one to twenty-five years or longer. The leases have been processed according to 25 C.F.R. Part 162. Part 162 provides, among other things, that (i) all leases shall be in a form approved by the Secretary and subject to his written approval, (ii) leases shall not be approved or granted at less than the present fair annual rental subject to limited exceptions, (iii) no lease shall provide a lessee a preference right to future leases, and (iv) prior to granting a lease, the Secretary shall advertise the land for lease under sealed bids and without preference rights, subject to limited exceptions. There is no inquiry into how the lessee organizes its business operations. It is thus clear that these procedures are designed soley to obtain market rent value for the land without regard to the form of organization or operation of the lessee, and irrespective of how many $50,000 payments the lessee may or may not be entitled to receive. By assuring that market rent value is obtained this procedure guards against the abuses intended to be prevented by the 1987 Act, particularly with regard to the possibility that the lessor might participate in any additional payments occasioned by the form of organization of the lessee. Under these procedures the Tribe will obtain market rent, period.

Currently, some of the 130 lessees of the Tribe also participate in the crop program in which the Tribe is participating. Under the USDA's interpretation, whenever even one of the participating lessees is not, in the USDA's viewpoint, complying with cash rent provisions, whether or not through any fault of the Tribe, the lessee will automatically be combined with the Tribe and reduce the Tribe's payment from 1.8 million dollars to $50,000. This would occur even if the Tribe is in 100% compliance with the program. Moreover, there is nothing in the regulations which would bar the USDA from this determination at any point in time. The Tribe could expend the funds to grow the crop for an entire season and half way through the growing season find that instead of receiving the 1.8 million dollars in payments it anticipated, the Tribe's payments from the program are reduced to $50,000.

The ways in which a tribe could eliminate the risk of this loss of anticipated revenue are all drastic and unacceptable. Because there is no practical way to ensure the USDA may not determine that a given lessee is out of compliance in some manner, no matter how small, the Tribe would be forced either to forego participation in the program to the extent allowed under the regulations because of the risk it will never receive those payments or try to prohibit all of its lessees from participating in the program. If the Tribe decides not to participate in USDA programs, it places itself at a severe competitive disadvantage with non-tribal farmers. If the Tribe tries to prohibit lessees from participating in such programs, the ability of the Tribe to lease its lands would be significantly impaired. Another option is for the Tribe to quit farming and lease all of its land, thereby foregoing the substantial economic return from the farming operation. The Tribe also could farm the entire acreage on the reservation which may be either impractical or increase a Tribe's risks by not being able to diversify the use of its resources.

Tribes are being required to make unacceptable choices in the face of this interpretation. When viewed against a backdrop of (1) the 1987 Act and its legislative history, neither of which mention Indian tribes as a concern, (2) the federal government's goal of increasing economic development on reservations, (3) a leasing process that, through its requirements, protects against the types of contemplated abuses, and (4) the impractibility of controlling the internal business operations of the lessees by the Tribe, the unreasonableness of USDA's proposed interpretation is all the more evident. Therefore, the Tribe respectfully requests that the Department contact the USDA and submit this issue for resolution pursuant to the Agreement. We would appreciate an opportunity to participate in the decision-making process.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Daniel Eddy Jr.
Daniel Eddy, Jr.,
Chairman, Tribal Council

AGREEMENT IN PRINCIPLE

BETWEEN

U.S. DEPARTMENT OF THE INTERIOR

AND

U.S. DEPARTMENT OF AGRICULTURE

The U.S. Government is the trustee of most American Indian lands and maintains a government-to-government relationship with Indian tribes. The U.S. Department of the Interior (USDI) and the U.S. Department of Agriculture (USDA) have a common objective of helping to promote the highest and best use of trust lands.

The USDI is the lead agency of the Federal Government for the administration and protection of Indian trust land and resources and the enforcement of treaties, laws, and regulations pertaining to the welfare of American Indians. The agency is also responsible for implementing self-determination policies for these groups.

The USDA is the lead agency of the Federal Government for providing effective and efficient coordination of Federal agricultural and rural development programs. In providing its services, USDA recognizes its responsibilities with regard to American Indians. USDA recognizes that these entities possess the right to exist as separate governments, with authority to govern themselves and manage their resources.

USDI and USDA, in recognition of their respective responsibilities, enter into this agreement as a foundation for their endeavors in promoting the objectives of meeting the needs of American Indians. Through this agreement, USDI and USDA will work in partnership to improve the delivery of programs and services to better meet the needs of American Indians.

Donald Paul Hodel
Secretary of the Interior

January 14, 1988
Date

Richard E. Lyng
Secretary of Agriculture

January 20, 1988
Date

Attachment "D"

Excerpts from F. Cohen, Handbook of Federal Indian Law, 596-598 (1982)

"The United States, in its role as guardian of Indian lands, is charged with the responsibility of administering trust property for the sole use and benefit of its Indian wards. The underlying premise of the Winters doctrine is the government's promise, implicit in the establishment of reservations, to make them livable and to enable Indians to become self-sustaining. Yet most Indian tribes are not utilizing their full legal entitlement of reserved water rights. Only a small portion of the irrigable lands belonging to Indians or Indian tribes is being cultivated or is included within irrigation projects. For political and institutional reasons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes. As stated by the National Water Commission:

During most of this 50-year period [following the decision in Winters v. United States, 207 U.S. 564 (1908)], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior - the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian Tribes might have had in the waters used for the projects....In the history of the United States Government's treatment of Indian Tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters."

. . .

"The legal right to water does not automatically bring with it the capital investment necessary to realize its economic benefits. Irrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indians. Consequently, most Indian tribes have not been able to utilize their full entitlements of water."

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 238-3820
238-3822
238-3818
238-3817
238-3816
238-3815

TRIBAL ATTORNEY'S OFFICE
P. O. BOX 306
FORT HALL, IDAHO 83203

STATEMENT OF THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION IN IDAHO BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, WASHINGTON, D.C.

APRIL 6, 1989

PRESENTED BY
MARVIN D. OSBORNE, CHAIRMAN

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho[1] greatly appreciate this opportunity to appear here today before the Senate Select Committee and engage in an urgently-needed dialogue on the critically important matter of federal Indian water policy.

Federal Indian water policy, for better or worse, is the dominant and driving force underlying water allocation systems in Western states. It is a topic that embraces a very complex, expansive range of subjects deeply rooted in American history, and it is impossible to adequately address that breadth of issues in anything short of a multi-volume treatise. Accordingly, in the time allotted for our oral testimony and this written submission for the record, we try to focus on salient aspects of, and general impressions derived from, our continuing relationship with the United States in the water arena.

There are at least two families of severe problems in the area of federal policy which are of grave concern to our Tribes. First, while Congress has often expressed its strong and continuing commitment to fulfill the promises made to tribes in treaties, Indian interests have been subjected to and suffered from a lack of clarity and follow-through on the part of the Legislative Branch in numerous respects. Second, over the recent past a general malaise has plagued the Executive Branch in the area of effective advocacy and ultimate vindication of Indian rights.

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[1] The 1868 Fort Bridger Treaty (Treaty), 15 Stat. 673, secured the Fort Hall Indian Reservation as a "permanent home" for the Shoshone-Bannock Tribes' "absolute and undisturbed use and occupation." In interpreting that Treaty, the United States Court of Appeals for the Ninth Circuit, in Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983) found "the objective of [Tribal] self-sufficiency [to be] implicit in the 1868 Treaty."

Clarification of the congressional and executive trust responsibilities is imperative, especially since the Supreme Court recently agreed to review state challenges to the longstanding Winters Doctrine announced in 1908, and its key corollary, quantification of Indian water rights reserved for agricultural purposes based upon all "practically irrigable acreage" within Indian reservations.

Western states are at this very mommont, in this nation's highest court, advancing the wholly untenable position that Indian tribes are entitled under federal law to only that amount of water necessary to fulfill their "minimal needs." States are urging that Court to allow them "flexibility" in "tailoring" water rights to meet minimal tribal needs and assure that Indians, at best, derive only a "moderate living" from their trust resources!

We view the states' argument as nothing more than a thinly-veiled attempt to expropriate and/or devalue tribal assets vested at the time of treaty-making, thereby threatening to consign Indian people to the status of a permanent underclass.

The Court's retreat of late in other civil rights contexts that do not implicate vested Indian treaty rights dangerously foreshadows the possibility that a majority of the Court will accede to the states' continuing efforts to dismantle tribal governments, thereby allowing such states to feed their insatiable appetite for the resources essential to preservation of Indian homelands. As the branch of government entrusted with plenary power in the field of Indian affairs, the time for Congress to speak clearly has never been more at hand.

As Indian people we realize that we may not be able to live through these historical and continuing assaults by states upon our rights and, indeed, our very existence as tribal people. If Congress, in its plenary role, either through inaction or election, determines that it is now time to turn away from the solemn promises made to tribes, we want to know that now. We don't believe that Congress, or the nation, is ready to break faith with Indian people. If we are right, there is much to be done immediately.

First, it is critical for Congress to provide sufficient funding to enable affected Indian tribes, assisted by the United States, to properly assert their water claims and effectively defend their federally reserved water rights. As we shall detail in written testimony submitted for the record, the Shoshone-Bannock Tribes, the State of Idaho, the United States, and coalitions of Idaho water users have been engaged in good-faith, government-to-government negotiations since 1985 to determine the nature and extent of the Tribes' reserved water rights in the Snake River Basin in Idaho.

These unparalled and historic negotiations are occurring within the context of a state court adjudication. They are designed to result in a settlement agreement that will obviate the need and cost for divisive and protracted litigation. A settlement of the Tribes' claims to reserved water rights on or near the Reservation appears imminent. However, in light of the experience of other tribes and states which led to successful resolutions of water conflicts, all parties to the negotiations are gravely concerned that Congress may not provide the federal resources essential to implementing such an unprecendented agreement as is contemplated for the Snake River.

The negotiations have also clearly indicated that congressional clarification is necessary with respect to off-Reservation marketing of our reserved water rights. As we shall detail in a further written submission to the Select Committee, transfers involving reserved Indian water rights are essential to resolving Western water conflicts, as well as improving the operation, flexibility and peformance of malfunctioning, outdated water allocation systems across the West.

Opponents of tribal use of reserved water rights off-Reservation typically base their objections on inaccurate and strained explications of Congressional intent. For example, it is argued that Congress, in the

Indian Non-Intercourse Acts of the late eighteenth century sought to prevent Indian tribes from engaging in water transfers in the twentieth century. Similarly, opposition to Indian water marketing is often based on narrow interpretations of appurtenance requirements as well as the contention that tribal transfers will result in unfair "windfalls" for Indians which are inconsistent with the original tribal/federal intentions of reserving lands for the tribes.

Most incredibly, our state adversaries seriously purport to contend in the High Court that Indian signatories to the treaties, in exchange for surrender of the right to occupy millions of acres of pristine land---and the way of life they had enjoyed since time immemorial---received in return nothing more than an opportunity to achieve the barest minimum standard of living. We do not exaggerate the gravity of the situation or the implications for the integrity of the American political process. While our people, young and old, continue to suffer and die before their time, we are forced to contend not only with overtly hostile states. We face now, as always over the past two centuries, a federal governmental structure whose mission is unclear and which, on occasion, exhibits an alarming indifference to our future.

What must be done?

Consistent with its primary role, Congress must effectively act to end these incessant assaults on Indian people and their legitimate resource entitlements. First, Congress must adequately fund and effectively provide for tribal participation in negotiations and/or litigation designed to quanitfy their vested water rights. Second, Congress must provide necessary funding to implement such water rights once they are negotiated or, if necessary, settled through litigation. It is wholly unrealistic to expect that desirable out-of-court settlements of Indian water rights can be reached absent effective tribal participation and proper federal financing and protection. Third, Congress must provide both the Executive Branch and the Judicial Branch of the federal government with an unequivocal declaration of intent that Indian reserved water rights are to be honored.

We understand that the Select Committee in January of this year elicited testimony from Louis Clairborne, a former senior attorney in the Solicitor General's Office of the Department of Justice. Mr. Clairborne, who prepared and argued numerous Indian law cases before the Supreme Court over a period spanning two decades, expressed deep concerns---and despair---over the absence of a principled commitment by Executive agencies to effective advocacy and vindication of tribal rights. He, and other witnesses, especially identified the recent positions taken by the Solicitor's Office of the Department of the Interior, essentially characterizing such positions as, at best, haphazard inconsistent, and unnecessarily defeatist, and, at worst, openly hostile to Indian interests.

Mr. Clairborne's objective impressions, earned from the broadest experience, should give the Congress---and the nation---great pause.

We hope it is unnecessary at this late date to detail our deep consternation and distrust of the federal advocacy undertaken on our behalf that so consistently sells short the solemn promises that the American people made to our ancestors in the last century. Indian tribes have uniformly maintained the honor of their treaty promises; a fidelity at least as constant and unflagging is due in return.

Finally, we cannot overstate that once Congress appropriates funds to assist tribal governments in protecting their water rights, it is absolutely essential that Executive branch agencies not be accorded unchanneled discretion to withhold the human and financial resources necessary to realilzation of tribal self-determination.

For example, the 1986 Amendments to the Safe Drinking Water Act, in part, authorized the Environmental Protection Agency (EPA) to treat federally recognized Indian tribes as states, i.e., as having primary responsibility for administration and enforcement of regulation of public water systems and underground injection control programs within the tribe's jurisdiction. Congress' amendments brought the Safe Drinking Water Act of 1974 into line with longstanding federal Indian policies of self-determination and self-government.

On September 26, 1988, EPA promulgated regulations specifying those provisions of the Safe Drinking Water Act which are appropriate for primary administration and enforcement by tribal governments. Those regulations established a three-step process for achieving tribal primacy:

(1) prepare and submit to EPA a tribal application for treatment equivalent to a state;

(2) apply for federal funds to develop tribal public water systems and injection control programs; and

(3) apply to EPA for delegation of primary enforcement responsibility.

This three-step process might appear, on the surface, to be a sound approach to achieving the intent of Congress expressed in the 1986 amendments. However, achievement of the clear congressional intent of those amendments---to facilitate and assure tribal self-government---is being severely impaired by EPA's activities in two areas.

First, the overall approach to implementation of the 1986 amendments is "demeaning, condescending, and totally misapprehend[s] the historical and legal bases of tribal sovereignty,"[2] Rather than facilitate and assist in achievement of tribal primacy, EPA evidently views its role as that of a "watchdog" and its mission as one of assuring that only those tribes which are truly "deserving" of primacy actually attain such status.

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[2] M. Tano, "Attaining Primacy Under the Safe Drinking Water Act," Tribal Utilities Report, Vol.1, No. 1 (November 1988), p. 2.

It is possible that EPA, in establishing rules and regulations for delegating responsibility to Tribes, was primarily seeking to protect itself from attack by states intent on minimizing the extent of tribal jurisdiction. In establishing such onerous rules and regulations for tribes to satisfy, EPA might have sought to deter states from challenging such delegations of responsibilities upon the grounds that such delegation of enforcement and regulatory authority to a tribe is arbitrary or capricious.

It is of little import whether EPA deliberately adopted such a heavy-handed approach in order to minimize the authority of tribal government, or whether such an approach appeared to EPA to be a logical and reasonable way of moving tribal government in the direction of assuming primacy while protecting the agency from litigation brought by competing jurisdictions. The fact is that EPA's rules and regulations, by placing a series of hurdles in the path of tribal governments, will prevent all but a handful of Indian tribes from ever achieving primacy on equal footing with the states.

Second, EPA's pathetic allocation of agency funds to support tribal activities in the area of controlling underground injections and regulating public water systems totally disregards Congress' intent in passing the 1986 amendments. Rules and regulations governing the process whereby Tribes are delegated primary responsibility require a substantial commitment of resources.[3] The real issue is whether and how such resources will be made available, i.e., will EPA adequately assist tribes by providing necessary human and financial resources to overcome substantial barriers to achieving primacy? Or will tribes have to cut other tribal programs just to prepare an application which has a chance of receiving EPA's approval?

To date, EPA's lack of commitment has been absolutely appalling. EPA has failed to provide adequate resources for tribes to effectively participate in the process for attaining primacy. EPA has failed to enable tribes to control underground injections, to regulate public water systems, or to achieve primacy in a number of other areas where Congress has clearly stated its intent to facilitate self-determination.[4]

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[3] In addition to fulfilling the requirement of federal recognition, successful tribes must also: provide a detailed assessment of the 'political feasibility' of assuming primary responsibility; carefully document all tribal jurisdictional claims and substantiate the same with a legal brief by tribal attorneys which makes a compelling argument in support of tribal jurisdiction; and provide EPA with convincing evidence that the tribe is capable of administering such programs.

[4] For example, EPA allocated only $20,000 for all Indian tribes in Region X to implement Section 104(b)(3) of the Clean Water Act. EPA's commitment to assisting tribes to achieve primacy in other areas of environmental regulation such as air quality has, likewise, been absolutely pathetic.

If Congress is serious about self-determination for Indian people in the area of environmental protection for their reservations, EPA cannot be relied upon to provide the necessary resources to the tribes out of the agency's existing budget. Congress must either increase EPA's budget by an amount sufficient to provide tribes with necessary resources or, alternatively, indicate that EPA's distribution of existing funds must undergo specific, congressionally-directed reallocations.

Our intent today is to identify this concern as a serious matter for Congress to be cognizant of in its discussion of federal Indian water policy. We understand that the Select Committee plans to focus on the issue of how to best provide for achievement of tribal primacy in environmental regulation and enforcement by holding hearings in May of this year. At those hearings we shall provide the distinguished membership of the Committee with a more detailed tribal perspective on this important matter.

We also intend to promptly submit to the Select Committee a more detailed, written assessment of the issues and concerns we have raised today as well as other crucial matters which time did not permit us to discuss. Again, we thank the Committee for the opportunity to appear here today on matters of the gravest importance to our people and to the nation.

Understanding federal Indian policy, as stated at the outset, demands an exacting study of an expansive range of extraordinarly complex subjects. We hope, that in finding our collective way through that maze, we will all be constantly aware that water is the source of all life bestowed by our common Creator. As expressed by Chief Tyhee of our people over 100 years ago in negotiations on the initial cession of Reservation lands authorizing the creation of the Town of Pocatello, "What we do must be for the rising generation." In charting a course for federal Indian water policy, please be mindful of the welfare of all our children, and of all the children yet unborn.

Pyramid Lake Paiute Tribal Council
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Mr. Chairman, distinguished members of the committee, I am honored to testify before you today on an matter of grave importance to my tribe, water. My name is Joe Ely, I'm the Tribal Chairman for the Pyramid Lake Paiute Tribe. Our reservation is located 36 miles northeast of Reno, Nevada and is 475,000 acres in size. Pyramid Lake is 115,000 acres in size located totally within the boundaries of the reservation. Pyramid Lake receives its water from Lake Tahoe, 100 miles to the southwest via the Truckee River which flows through the city of Reno and on to Pyramid Lake. Pyramid Lake is a terminal body of water with no outlet and with only the Truckee River as its supply of inflow.

The Tribe derives most of its livelihood from the Lahontan Cutthroat Trout fishery by selling use permits for fishing, boating and camping. Many of the families residing on the reservation are employed by the fisheries with the balance employed in the tribal administration, private enterprise, cattle operations, and off reservation employment in nearby Reno. We have a total membership of about 1800 people of which about 1500 reside on the reservation.

To understand the cultural significance of water to our people and specifically the importance of the Truckee River water you have to go back to our origins. The legend of the Stone Mother tells of the origin of our people. It tells of settlement of the tribe, cui-ui tuccatta (Cui-ui eaters), it tells of the Lakes origin Cui-ui pah (Cui-ui lake) and the origin of its fish, the Cui-ui. It tells us that all this creation was simultaneous, that the son of the Stone Mother became our ancestor, that the tears of the Stone Mother became our lake, that the lake's shore became our home and its depths the home of our fish the cui-ui. This legend sets our identity and forever fixes the components that make up our way of life. When we talk of the water it must be understood that it is a major component of our identity and way of life. Those components are the people - Cui-ui tuccatta, the lake - Cui-ui pah and the fish - Cui-ui. These are inseparable components and one does not exist without the other. I know one might make light of this significance or write it off as romance, but to us it is everything. And as we watched the scramble and the money flow to celebrate the Statue of Liberty which we consider of lesser significance we know that your culture also holds important its own identities and rituals.

After the lakes origin and since time immemorial the Tribe has lived near its shore and has drawn its sustenance from its abundant supply. We were a prosperous people, our main sustenance being the Cui-ui fish found only at Pyramid Lake and to a lessor degree from the large Lahontan Cutthroat trout which also inhabited the lake. Most of our lives were spent gathering food and partaking in various festivals and ceremonies associated with those gatherings. There were rabbit drives, deer hunts, pine-nut gatherings, mudhen and duck harvests at adjoining Winnemucca Lake, trout fishing and many other forms of harvesting ventures. But none like the annual harvesting of the Cui-ui. The Cui-ui would run in mid spring which would allow for about a two or three week harvest. The remainder of the year the Cui-ui would stay in the lakes depths and would be unavailable for catch. As the run developed, word was spread and the tribe made up of scattered bands would come together to re-new friendships and aid in the long but happy work of the harvest. Excitement and festivity would fill the air as many cui-ui were caught, dried, and stored for the coming year. The fish were abundant and could be caught by hand and stories are told of the water turning black with the fish and of small children climbing on the many backs of the fish as they moved into the shallows on their journey up river to their spawning grounds. This was a time like no other and the animation and excitement in the eyes of the elders as they tell these stories only give us a glimpse of its excitement. This way of life continued for many, many generations but as the twentieth century started it all come to an abrupt end.

In 1902 during the Roosevelt Administration and under the infant Bureau of Reclamation, Congress authorized the bureau's first reclamation project. The plan was to direct water from the Truckee River upstream of Pyramid Lake to what was then a large desert basin and turn the sand into green fields and farm land. This project is known as the Newlands project which has proven to be a failure as a agriculture project, has dealt a tremendous blow to the Tribe and is currently spelling death to any and all wildlife associated with its operation. To accomplish the project in 1905 Derby Dam was completed and water was diverted to the project. Within the next 40 years the elevation of Pyramid Lake dropped 70 feet creating an impassible delta and barrier between the lake and river, the Lahontan Cutthroat trout became extinct in Pyramid Lake and the Cui-ui numbers shrunk to a point where harvest became impossible. Pyramid's sister Lake, Lake Winnemucca dried completely taking with it its wildlife and wetlands habitat. It appeared our way of life and existence as a people were nearing an end.

In 1944 the Federal Government dealt what should have been the coup de grace to the Tribe when the Bureau of Indian Affairs negotiated on our behalf the Orr Ditch Decree. The decree was to put down in writing the various water allocations on the Truckee River. It was BIA's task to use the Winters Doctrine and protect our water to preserve our purpose as a people. But early on in the forming of the decree BIA made a terrible error, an error that would set the tone for many years of litigation and hardship for our Tribe. BIA determined that it was the purpose of our tribe that we should be farmers and even though we continued to explain our status as fisherman, BIA went in to negotiate our rights only as farmers and not as fishermen. The result was after the final gavel fell and the Orr Ditch Decree was set the Tribe was to receive a water right of 31,000 acre feet total from the Truckee River to be used only for agriculture irrigation purposes. Pyramid Lake and the fisheries were given no right of any kind and would only receive what was left over after Newlands project and all other water rights were taken. From receiving 450,000 acre feet of water annually (it takes at least 400,000 acre feet annually just to replace evaportation losses and maintain the lake level) into Pyramid Lake before the turn of the century to ending up with a right to only 31,000 acre feet for agriculture irrigation and zero right for fisheries after the Orr Ditch Decree, our tribes ability to maintain its livelihood and way of life became a near impossibility.

Much of what has happened since then is well documented. Our Tribe has engaged in litigation for many decades to reclaim the water necessary to restore our fisheries. We've suffered some loses and won some victories but one thing I can tell you is through blessings of God and the tenacity of our people, we're still here. Our people and our resource although crippled and many times down are surviving and recovering. The Lahontan Cutthroat Trout have been re-introduced into Pyramid Lake and thanks to the continued financial support of Congress we have managed to build hatcheries ranked in the best of the nation and have turned the trout fishery into a success that ranks within the top three trophy fishing lakes in the United States holding the worlds record with a 41 pound trout caught in 1925. The Lahontan Cutthroat Trout is still listed as Threatened on the endangered species list primarily because of their reliance on a artificial hatchery spawn, but their recovery is steady and its our hope a complete recovery, including a natural spawn in the river, will occur in the future. Their success will spell economic recovery for our Tribe. The Cui-ui are another story, although they have survived they are doing very poorly and do not reproduce well in a hatchery environment. The Cui-ui are not only an endangered species but are also an endangered genus found only in Pyramid Lake. They still stand on the brink of extinction and if it wasn't for a couple of flood years in our recent past they would have been gone forever.

There is only one solution to the Cui-ui's problem, water. Water of sufficient quantity to allow the fish over the lake's delta and into the river to spawn and of sufficient quality to provide habitat for that spawn.

The Tribe has been in the recent years a party in an effort to achieve an overall settlement of the water problems in the Truckee River system. And due in large part to the efforts of Senator Reid this settlement is going well and you should be receiving a bill in the next couple of months. The primary parties involved will be the Pyramid Lake Paiute Tribe, the Federal Government, the states of Nevada and California and Westpac Utilities the water purveyor for the cities of Reno and Sparks, Nevada.

We hope to take care of many of the water problems plaguing the area as well as going a long ways in insuring the water necessary for our fisheries recovery. Unfortunately the Newlands Project will not be a party to this agreement. And its the Newlands Project that remains the poison on the system. Its easy to guess their reasons for not negotiating, their sweetest deal was cut in 1902 when the project started and in 1944 under the Orr Ditch Decree. As long as the Federal Government chooses to ignore the problem and the project it will remain steadfast in its no negotiation posture. For the sake of simplicity lets tally up the score of destruction the Newlands project has executed. Since 1905 it has completely destroyed the natural Lahontan Cutthroat trout fishery at Pyramid Lake which consequently completely destroyed the Tribes economy leading to reliance on Federal funds, it has all but led to extinction of the Cui-ui which is the identity and major component of the Tribes way of life, it has dried up totally our sister Lake Winnemucca which was a thriving wetlands and water foul area, it has caused major destruction of the Stillwater Wildlife refuge near Fallon, Nevada where the project spills its toxic poison into the wetlands after irrigating its fields, and is currently destroying the worlds largest natural pelican refuge Anaho Island by contaminating the pelicans food supply at the Stillwater Wetlands. The sad part of all of this is there is a solution and the destruction from this project could be stopped if only the federal government would recognize its mistake and take action to solve the problem.

It is our hope that in the near future we will regain the water we need to restore our fisheries, restore our economy, restore our traditions and regain our strength as a people. Our water, fisheries and people are our livelihood and our way of life. We will struggle to recover and maintain what is ours and in the many generations left on this earth you can be guaranteed one thing, we'll still be here.

Thank You

STATE OF WYOMING
OFFICE OF THE GOVERNOR
CHEYENNE 82002

MIKE SULLIVAN
GOVERNOR

STATEMENT OF

WYOMING GOVERNOR MIKE SULLIVAN

BEFORE THE

U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

April 6, 1989

Mr. Chairman and members of the Committee, my name is Mike Sullivan and I am the Governor of Wyoming. I am a member of the Western Governors' Association and represent WGA as lead governor for the Ad Hoc Group on Reserved Indian Water Rights.

Other members of the Ad Hoc Group include representatives from the National Congress of American Indians, the Council of Energy Resource Tribes, the Native American Rights Fund, and the Western Regional Council. The Ad Hoc Group has met since 1982 to review and advance negotiated settlements of Indian water rights disputes, and to identify and resolve barriers which impede such settlements.

When I became Governor of Wyoming in 1987, I inherited a ten-year old lawsuit affecting all water rights within Wyoming's Big Horn River basin -- a twenty-one thousand square mile area containing the Wind River Indian Reservation.

The lawsuit has been both costly and time-consuming. Wyoming has spent nearly $14 Million on the suit. We have been before a Special Master, two District Court judges, the Wyoming Supreme Court and now the U.S. Supreme Court.

While I have recently concluded a temporary one-year agreement with the Shoshone and Arapaho Tribes covering both mineral tax and water areas, the State's attorneys have taken the water litigation into the U.S. Supreme Court. Given what we believe to be confusing and inconsistent standards in this area, Wyoming cannot abandon its interest in obtaining a definitive ruling on the appropriate quantification standard for the tribal reserved water rights.

Without criticizing my predecessors, I must say that our expreience would appear to confirm the view of many that litigation does not fully nor quickly resolve problems faced by the Tribes, the State, nor private water users. Given my experience, I believe that negotiated settlements are the preferred way to go. However, there are some significant barriers to negotiated settlements which must be addressed and resolved.

The Ad Hoc Group has spent seven years attempting to identify and overcome these barriers to negotiated settlements. This past year the group joined with the Western Senate Coalition, co-chaired by Senators DeConcini and Domenici, to co-sponsor two workshops here in Washington on Indian water rights. The workshops offered an opportunity to discuss the general principals and issues raised by settlements, and to later review the experiences from the three settlement bills which recently passed Congress.

I welcome this opportunity to provide you with what I have learned from these efforts. For the record, I wish to submit the WGA policy resolution on Indian water rights and the reports from the two workshops for elaboration.

1. Indian reserved water right disputes must be acknowledged as a national responsibility. They result from historic and often conflicting federal policies which were formulated and enacted by a series of Administrations and Congresses.

Fulfillment of treaties and trust responsibilities is a unique federal obligation.

Equally important, the federal government must recognize that federal laws and policies encouraged settlement and water development by non-Indians. There is a clear national responsibility to account for the obligations to tribal members as well as to non-Indians who have established property rights and deeply held values through investment in our western agricultural economy.

2. Negotiated settlements cannot be advanced without more certainty and continuity in the "rules of the game." Federal agencies should provide dependable, continuous and competent assistance to the tribes. This assistance should include technical, legal and financial assistance. It should also include a structure where one agency or official is designated to speak for and commit the federal government. Many agencies have legitimate interests --- BIA, Reclamation, Fish and Wildlifle, Department of Justice, OMB, EPA and others. However, the federal government needs to coordinate these agencies internally so that all interests have confidence in the fact that an agreement, once reached, will stick.

3. A sustained, good faith commitment to both negotiating and implementing settlements is needed to finally resolve these disputes. This will usually require reliable funding. States, tribes, and local governments are increasingly recognizing and agreeing to fair cost-sharing provisions. However, often the federal government bears the obligation for the largest share of financing. A separate line-item budget category is needed for the lengthy period required to resolve the many disputes.

The Ad Hoc Group has evaluated different revenues as possible sources of financing. We have studied the potential for using hydro revenues or the Reclamation Fund as a possible dedicated source of financing. The Ad Hoc Group stands ready to work with others to evaluate different revenue options as well.

4. Many settlements to date have contained some kind of water leasing or water marketing provisions. The Ad Hoc Group recognizes the controversial nature of these provisions due to State law, compact restrictions and the uncertain nature of Indian water rights. The Group is willing to work with others in reducing concerns caused by these provisions.

Finally, I would like to raise a concern which I have. I believe that the role of the States in these disputes must be emphasized and strengthened. States will want to be sure both that the dispute is resolved satisfactorily and that established economies are protected. I would like to see the Administration formalize a settlement negotiation process which reflects a strong role for States.

Thank you for this opportunity to testify. I would be pleased to respond to any questions which you or the other committee members may have.

Western Governors' Association
Resolution 87-006

Adopted: July 7, 1987
Snowbird, Utah

SPONSOR: Governor Sullivan
SUBJECT: Indian Water Rights

A. BACKGROUND

1. Water is essential to the economy and lifestyle of the West, on and off Indian reservations. For over eighty years, the federal government has allowed an untenable conflict to develop over reserved Indian water rights by encouraging non-Indian water development and by neglecting Indian water development. Indians, whose rights are generally senior to those of most non-Indians, have been deprived of gains in economic well-being which could come from being able to put the water to which they have rights to beneficial use. Non-Indians, who have made investments in good faith to put the water to which they have rights to beneficial use, now may face the loss of their investment and livelihood to senior Indian rights.

2. Over 50 disputes are currently in litigation. As has happened in many instances, litigation may cost millions of dollars, take decades to resolve, cause enormous disruption in the interim, and/or result in loss of rights or the awarding of paper rights which are useless without investment in the structures needed to store and deliver the water. The possibility of litigation clouds non-Indian rights, prevents development based on the rights in question, and causes hostile dissension between Indian and non-Indian neighbors.

3. Negotiated settlement of the water rights disputes provides a flexible process for resolving disputes. It can allow each of the parties involved to meet some or all of their major concerns. It allows for unique and creative arrangements to meet as many of the parties' concerns as possible. It secures commitment from all the parties to take action and provide the funding to implement the agreed-upon plan, according to an agreed-upon time schedule.

   In general, the agreement will maximize economic benefits by allowing reservations to progress towards becoming viable, self-sustaining communities; by protecting the investments of the non-Indians in their water use; and by maintaining state and federal revenues resulting from the productive use of the water. In addition it allows the federal government to fulfill its trustee obligations to the tribes and avoid payment of damages for breach of trust responsibility or of claims for compensation for lost rights from non-Indians.

4. The western governors have participated with representatives of business (the Western Regional Council) and Indians (the National Congress of American Indians, Native American Rights Fund, and Council of Energy Resource Tribes) in the Ad Hoc Group on Reserved Indian Water Rights. The group was established in 1982 to promote negotiated settlement of Indian water rights disputes. The group has pinpointed several general problems which threaten any and all attempts to resolve these disputes:

   - A sustained level of commitment by the Department of the Interior as well as other parties to the negotiations process. A high level commitment and consistent framework for negotiating is needed so that growing trust, progress on specifics, and confidence in the outcome can be maintained in the face of changing administrations, individuals within the Department, or representatives during negotiations.

   - A reliable commitment of funding to implement settlements, once reached. Most settlements will require funds to construct the facilities to deliver water to the reservations or other parties to the agreement. Because of the federal responsibility in these disputes, the federal government will generally be a significant, although not sole, source of necessary financing. Parties to the disputes recognize that budgetary limits may constrain immediate implementation. However, a reliable source of funding needs to be established so that once agreements are made within those constraints, schedules and commitments are kept.

   - Approval of the settlements by Congress. Most settlements require ratification and/or appropriation of funds by Congress. Because of their complexity, settlements often require unique provisions which may be exceptions to normal practice. If these exceptions are interpreted as a permanent or expressly authorized change in practice or as a precedent for other situations, and therefore approval of the settlements is withheld, it is unlikely any settlement will be able to be both reached and enacted.

B. GOVERNORS' POLICY STATEMENT

1. Assuring the certainty of water rights through settlement of Indian water rights disputes is important to facilitate economic growth both on and off reservations. Fulfillment of Indian treaties and satisfaction of Indian water rights is a uniquely federal responsibility assumed under the

United States Constitution and through a course of dealings manifested in treaties, federal statutes, and executive orders. It is inequitable either to ignore such responsibilities or, by neglect, to cast the burden of fulfilling them upon the western states.

2. In general, negotiated settlements are preferable to litigation. The U.S. Department of the Interior, which serves as trustee for the tribes, should firmly commit to a process of negotiations, including enunciating such a policy; establishing guidelines for federal participation; providing technical and financial assistance to the tribes; maintaining trained negotiating teams with authority to speak for and commit the Administration; identifying sources of financing; providing high level Department commitment to work out joint agreement to proposals with the Department of Justice and Office of Management and Budget; and assisting with support for the settlements before the Congress.

3. To the extent that expenditures are necessary to implement negotiated settlements, the federal government should assume a large part of the financial burden. A reliable source of funds is needed for resolution of Indian reserved water rights claims consistent with the established water uses of non-Indians.

   The Department of the Interior, Office of Management and Budget, and members of Congress should work with states, tribes, and other parties to the settlements to facilitate the provision of funds to implement settlements.

4. We recognize the legitimate concerns that people distant from negotiations may feel regarding the implications of provisions in that settlement for other situations. However, each negotiated Indian water rights settlement will be unique, carefully tailored to the parties who are directly affected, and may be totally inappropriate to any and all other situations. Because of overarching historic, moral, and economic imperatives, we urge all concerned parties, especially those in the Congress, to treat settlements as case-by-case, exceptional arrangements which could be perceived as possible models for related situations but which are not binding legal precedents. In addition, where significant disputes exist as to application of existing laws or programs within the context of particular settlements, Congress might consider a clause which expressly reserves the right to dispute these issues as an alternative to withholding consideration or approval. Without such general, flexible approaches, no state will be able to have the disputes within its borders fully resolved.

5. In sum, we see the following as essential elements of a policy favoring negotiated Indian water rights settlements:

- The settlements should be voluntary and consensual.
- The federal government should be willing to make a fair and just contribution.
- The settlements should be compatible with conditions in the state and locality.
- Because each situation is unique, the settlements should not follow any set formula. They should be creative and tailored to meet the facts and circumstances of each situation.
- Experience derived from successful settlements may assist in negotiating others but no settlement package should be seen for another.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. We reaffirm the participation of the Western Governors' Association in the activities of the Ad Hoc Group on Reserved Indian Water Rights.

2. We direct the WGA staff under the guidance of WGA's lead governor for Indian water rights to continue to work towards facilitating negotiated settlements.

3. We request that this resolution be sent to members of the Administration, especially within the Department of the Interior, members of appropriate congressional committees, and members of the western congressional delegation.

WORKSHOP ON INDIAN WATER RIGHTS

May 2-3, 1988

Background

Over fifty lawsuits now exist in state and federal courts to resolve disputes over tribal rights to water flowing on or past a reservation. Litigation is costly, time consuming, uncertain in outcome, and once decided, can displace existing water uses and provide only paper rights, not "wet water". The prolonged uncertainty clouds the validity of water rights for Indian and non-Indian alike, forestalling investment based on the availability of and rights to water, thus hurting tribes, businesses, states and the nation.

Ad Hoc Group

Western Indian, business and government interests have become actively aware of this dilemma. To address these issues and concerns, in 1982 an Indian Reserved Water Rights Ad Hoc Group was established. The Ad Hoc Group includes representatives of the Western Regional Council, Western Governors' Association, National Congress of American Indians, Council of Energy Resource Tribes and Native American Rights Fund. The Western States Water Council and Department of the Interior have recently been ex officio participants in the Ad Hoc Group. The purpose of the Ad Hoc Group is to promote negotiated settlement of Indian water rights in order to assist Indian economic development and to clear the cloud of uncertainty affecting rights because of the unquantified Indian claims.

In recent years the Ad Hoc Group has encouraged the Congress and the Administration to establish and institutionalize a capability for facilitating negotiation of Indian reserved water rights claims. As a result, a number of negotiations are under way and several settlements have been achieved. However, concerns raised in Congress and by other interests seriously undermine the possibility of final authorization or implementation of settlements.

Workshop

On May 2-3, 1988, a Workshop on Indian Water Rights was held in Washington, D.C., sponsored jointly by the Ad Hoc Group and the Western Senate Coalition. The purpose of the workshop was to assemble a small group of key officials and interests to discuss and seek to resolve policy issues that arise in the process of negotiating and authorizing Indian water rights settlements. It was co-chaired by Governor Michael Sullivan of Wyoming (the Western Governors' Association lead Governor on Indian water rights), and Ralph Cox, President of Union Pacific Resources Company (Chairman of the Western Regional Council Reserved Water Rights Committee). A copy of the agenda for the Workshop, the description of the issues which formed the basis and direction, and a list of the participant and observer attendees is attached.

The format for the workshop included both small group and plenary session discussion of twelve issues, identified and provided to participants in advance.

SUMMARY OF DISCUSSIONS

Of the twelve issues considered, there were no absolute deadlocks. A general consensus was reached on eleven of the twelve issues, and one issue, regarding use and lease of tribal water, was deferred for further consideration.

During the discussion, a number of "common threads" were identified, as follows:

I. Settlement Goals

There was agreement on the general settlement goals of the parties. However, the settlement goals differ with each settlement and must be considered on a case-by-case basis.

A. Tribes - want to use their quantified water rights to meet a number of additional objectives, including social, environmental and spiritual purposes, along with economic development to an "acceptable" standard of living.

B. Local water users - want to protect their established uses.

C. States - want to resolve conflicts while protecting established economies.

D. Federal government - must fulfill its trust responsibility while protecting federal coffers.

II. There is an "everyone but me" attitude suggesting that reponsibilities for funding be defined as follows:

A. Data collection and other technical advice and support to prepare tribes for negotiations is a federal responsibility.

B. Mitigation of impacts on established non-Indian water users is a combined state, federal and local responsibility.

C. Financing tribal water use facilities is a combined responsibility of the federal government and the tribes, with the objective of enhancing the tribal standard of living.

III. Settlement May Require Creative Use of Resources

A. Non-cash federal assets may be used when federal agencies and clients agree.

B. Water marketing may be considered when related conflicts and concerns can be addressed.

IV. Process

The process includes negotiations, legislative enactment and actualy implmentation. Affected local players should be included as their resources and rights are considered. As settlement concepts evolve, others are needed.

A. State governments.

B. Federal administration and agencies.

C. State congressional deligation.

D. Key members of Congress and committee staff.

V. All workshop participants concerned that negotiated settlement is almost always the preferred approach.

FUTURE ACTIONS

Before adjourning, workshop participants discussed options for future activities. Everyone agreed some near-term and long-term followup would be appropriate and valuable based upon the success of this workshop.

Where do we go from here? To continue to bring parties to the negotiating table, there is a need to lower the ratification uncertaintly. Negotiators need some flexibility on a case-by-case basis to achieve creative settlements. But there is a problem with settlements that cannot be authorized.

Is there a need for a guidance document for negotiators? There were mixed views about such guidelines because of the need for flexibility and changing circumstances and policies at the federal and local level.

Some general concepts for future action were agreed upon, as follows:

1. The matter of Indian reserved water rights disputes results from Federal actions and is a national issue and a national concern. As such, it requires federal involvement and leadership.

2. Authorization and implementation of a settlement is greatly facilitated by early involvement of all possible parties and interests in the negotiation process, including Congressional interests. All players and parties should be regularly updated and consulted during the negotiation process.

3. The Ad Hoc Group should recognize that early settlements are establishing precedents and the Group should play an active role to be sure precedents which are established are those which the Group supports.

4. We should compile a list of "devices" or options that have been included in settlements with a description of why they were included and an analysis of what has failed or been rejected. This list should be regularly updated and made available to negotiating parties.

5. At the beginning of each Congress, members of Congress and key staff should be advised on the status of negotiations so they can be prepared to know what settlements may be brought to that Congress for authorization.

Finally, all participants agreed that it would be useful to convene a followup workshop, perhaps in December of this year, to focus on the following agenda:

1. Issue No. 12 regarding off reservation use and lease of Indian water.

2. Review of progress, failures and successes of the three settlement Bill before the 100th Congress.

3. Consider whether broader interests should be included in further followup activities.

4. Discuss how to successfully convey to the new Congress the transition team and to key new officials of the next federal Administration the importance of the Indian reserved water rights issue to the West, the significant role of the federal Administration if Indian water claims are to be successfully negotiated, the substance of our common views on negotiation and settlement of Indian reserved water rights claims, and seek assistance in the negotiation, authorization, and implementation of additional settlements.

DISCUSSION OF SPECIFIC ISSUES

Issue No. 1

Issue: Is litigation the preferred solution to Indian water right disputes or can you support and participate in negotiated settlements assuming they result in final quantification and release of litigation?

Discussion: At times, litigation is necessary to establish a point of law. In most instances, though, negotiation maybe shorter, less expensive and more comprehensive. Litigation is often an effective means to get people to the negotiating table. Impediments to tribes participating in negotiations include availability of necessary data, whether they can enter into the process with confidence and an atmosphere of trust that the parties are dealing in good faith. This obstacle can be overcome by supporting the needs of tribes for information and expertise. An advantage of negotiations is that all the issues of all the parties can be put on the table. In litigation, issues are limited. In negotiation, all the parties can win something. Litigation often leaves more losers than winners.

Conclusions: All parties support the concept of negotiation, provided that litigation options are maintained. The federal government should provide tribes with the support (technical, economical and legal) necessary to negotiate on an equal basis. The governments closest to the people (state, local and tribal) must be involved in the negotiation process.

Issue No. 2

Issue: Under what criteria should investments in tribal water use facilities be evaluated? Should the criteria reflect public values such as economic development, social well being, and environmental quality?

Discussion: This issue involves a subjective element. Tribes see water right settlements as vehicles to help tribes reach ecnomic self sufficiency and a "modern" standard of living. There may be many benefits not easily quantifiable. A pure cost/benefit ratio analysis may not always be appropriate. The litigation liability and trust responsibility should be factored into the evaluation.

Conclusion: The criteria for evaluating investments in tribal water use facilities should include a range of values, including economic, social and environmental. Criteria should be broad and flexible in order to facilitate settlements. An important, but not the only, criterion for evaluating tribal water use facility investments is a comparison of costs against the sum of primary and secondary benefits.

Issue No. 3

Issue: What cost share value should be placed on contributed assets of non-federal parties in determining cost sharing responsibilities for water rights settlements?

Discussion: All parties to negotiations have assets which may assist in reaching settlement. Such assets may include contested water, rights-of-way, financial assistance, etc. Valuation is difficult when assets cannot be quantified. Parties, particularly the United States, must look beyond the limits of legal liability to areas of need and opportunity. Values may vary due to social and cultural priorities--valuations are not just economic but social and include the United State's trust respnsibility. Flexibility is important. Assets in a settlement should probably be valued in present value. No conclusion was reached regarding interest rates--Congress may have to decide.

Conclusion: Valuation of contributed assets should be flexible, include non-economic values, and be suited to the local circumstances in each settlement.

Issue No. 4

Issue: Should the Congress consider each settlement to be a precedent?

Discussion: The precedent argument is sometimes raised to block a settlement. However, a precedent can also be positive. It is instructive to look at previous settlements. If they work, they can be a basis for future settlements. They create a data base and provide a list of options for future settlements. Precedents can help facilitate congressional authorization. Precedents which could be impediments to settlements include sale or lease of Winters water, funding sources, environmental impacts, projected use of water (either on or off reservation), extinguishment of claims, monetary liability, third-party impacts, etc. We should anticipate problems with precedents in formulation of a settlement by looking at past settlements and working with members of Congress and Congressional Committees to identify and avoid possible obstacles. All parties can learn from both the negative and positive aspects of settlements.

Conclusion: Whether intended or not, any settlement or settlement legislation will be viewed as precedent. However, Congressional precedents are not necessarily adverse or binding and can be both positive and negative.

Issue No. 5

Issue: What relative benefits should the parties to a settlement expect to receive?

Discussion: Successful settlements require early appreciation of the respective advantages of settlement versus litigation, and early understanding of the need to look at everyone's "wish list". Advantages of negotiated settlements include flexibility, consideration of a wider range of benefits than litigation, near-term benefits to Indians (dollars, development, jobs, wet water) and certainty, clarification of rights and finality for non-Indians. These potential advantages should be weighed in determining settlement benefit expectations.

Conclusion: Parties to a settlement should expect to receive something less than they would receive in the future through successful litigation.

Issue No.6

Issue: What federal assets may be used in structuring settlements?

Discussion: The first step in identifying appropriate federal assets for use in settlements is to determine the goals of the parties. Once the parties' goals are identified, then the whole range of assets should be considered, including existing reclamation plumbing, uncontracted reclamation water and power, federal land and resources, etc. When considering federal assets, federal agency or land managers and their constituencies should be consulted. The broader the assets, the more complicated the task of building political support. Finally, it was suggested that all parties, not just the federal government, should have all their assets on the table.

Conclusion: All federal assets could be considered in structuring settlements.

Issue No. 7

Issue: Who should finance tribal water use facilities as part of settlements?

Discussion: The issue pre-supposes a settlement will result in facilities being built. If so, costs could be distributed consistent with benefits and responsibilities. Extremes are "all Federal" and "no Federal" financing. No strict formula is applicable because of political, economic and other factors. It would be unrealistic to shift most of the burden to local non-Indians. Options for non-Federal financing include tribal resources (including revenue bonding, water marketing), junior appropriators that stand to lose the use of historical water supplies (through limited-term lease back-provisions), state and local contribution to avoid economic disruption, etc.

Conclusion: There is no strict formula to determine who should finance tribal water use facilities. However, factors to be considered include benefits and responsibilities of the parties.

Issue No. 8

Issue: What restrictions should be placed on tribal use of settlement trust fund monies?

Discussion: Should there be any restrictions on trust fund use? The federal government always has an obligation to advise the tribes and, an oversight, would assume some risk if funds were mishandled. Policy issues must be closely evaluated. The federal government may want to discuss this question with Tribes on a case-by-case basis in settlement negotiations.

Conclusion: There should be no uniform or "boiler plate" restriction on use of tribal settlement trust fund monies. However, the federal government does have an obligation to advise the tribes and assumes some risk if tribal funds are mishandled.

Issue No. 9

Issue: Who should bear the burden of the public interest in negotiated Indian water rights settlements?

Discussion: The public interest was defined as including a number of areas such as a national interest in economic development, social justice and equity for Indian tribes, protection of environmental values, efficient resource management, etc. It was suggested that those who have benefitted the most should bear the greatest responsbility. All parties and beneficiaries have some responsibility.

Conclusion: It is difficult to generalize--the responsibility should be determined on a case-by-case basis. However, the federal government should bear a portion of the burden of the public interest in every settlement. States also have a responsibility in this area as their citizens have benfited from historical use of Indian water, and states can be the catalyst for Indian economic development.

Issue No. 10

Issue: What is the extent of the federal obligation to Indian tribes?

Discussion: The trust obligation is an evolving concept that has to be evaluated in legal, economic, social, resource and political terms. The federal government has additional obligations to tribes beyond those encompassed in the trust responsibility.

Conclusion: The federal obligation is a trust responsibility that includes legal, social, economic and political responsibilities. There is a need to establish the Federal role and then approach the problem of available resources. Since the trust responsibility is national, people outside the West should also pay.

Issue No. 11

Issue: Who should finance measures to offset impacts of negotiated settlements on established non-Indian water users?

Discussion: Settlements should be considered on a case-by-case basis. All parties have something to gain and, therefore, should participate in obviating the impacts that occur. Since the problem of unquanitified Indian rights has been created by the United States and non-Indians have developed reliance thereon, the United States has an obligation to help finance offsetting measures. It is easier to defend a settlement in Congress if all parties are sharing the burden.

Conclusion: Responsibilities differ on a case-by-case basis. The federal government has an important role in every settlement which extends beyond the Federal litigation liability. The remainder of the burden should be borne by state and local governments and the affected non-Indian water users.

Issue No. 12

Issue: What restrictions should be placed on tribal use and lease of water?

Discussion: General agreement that because of scarcity of funds, some marketing is desirable. Participants raised many views and concerns regarding the scope of tribal lease of water. In part, the issue depends upon the definition of the nature and scope of the Indian water right which is a property right of the tribes rather than an asset owned by the United States. Related issues and concerns include which state's interstae water allocation leased water is credited against; is it appurtenant to the land; how do treaties, the Non-Intercourse Act, reclamation law, water compacts, state water rights, etc., impact the nature and use of the Indian water right? It was noted that restrictions in the use of Indian water may be a taking, requiring compensation to the tribes. Use of Indian water may be more a policy than a legal question. Differing and conflicting views were expressed.

However, some differences were narrowed and options were considered. A specific option was suggested whereby when leased, a state would recognize the Indian water right as a state right, subject to all the opportunities and restrictions of a state water right. Under that option, the Winters right would be held in abeyance while under lease and not be subject to forfeiture.

Conclusion: This was the most difficult issue discussed at the workshop. Participants generally agreed to disagree. However, some differences were narrowed and options were considered. Participants agreed that because of scarcity of funds, some kind of marketing or transfer of Indian water rights could provide needed funds to facilitate settlements. It was generally agreed that some intrastate leasing could be accomplished. Finally, participants agreed that questions surrounding tribal lease of water are central to the settlement of many claims and should be considered in a future workshop.

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WESTERN SENATE COALITION/
INDIAN WATER RIGHTS AD HOC GROUP

WORKSHOP ON INDIAN WATER RIGHTS

Hyatt Regency - Capitol Hill
May 2-3, 1988

AGENDA

Monday, May 2, 1988 - Columbia C - Ballroom Level

5:30 - 6:00	Registration & Reception
6:00 - 7:00	Dinner & Welcome
7:00 - 7:15	Overview of Program
7:15 - 8:00	Small Groups - First Set of Issues
8:00 - 9:00	Plenary Session
9:00	Recess for the Evening

Tuesday, May 3, 1988 - Yellowstone/Everglades - Conference Level

8:30 - 9:00	Continental Breakfast
9:00 - 9:15	Planning Session
9:15 - 10:00	Small Groups - Second Set of Issues
10:00 - 11:00	Plenary Session
11:00 - 12:00	Small Groups - Third Set of Issues
12:00 - 1:00	Lunch
1:00 - 2:00	Plenary Session
2:00 - 3:00	Small Groups - Fourth Set of Issues
3:00 - 4:00	Plenary Session
4:00 - 5:00	Closing Session
5:00	Adjourn

WESTERN SENATE COALITION/
INDIAN WATER RIGHTS AD HOC GROUP

WORKSHOP ON INDIAN WATER RIGHTS

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WORKSHOP ON INDIAN WATER RIGHTS

December 7, 1988

REPORT

BACKGROUND

At the beginning of 1988 over fifty lawsuits had been filed in state and federal courts to resolve disputes over tribal rights to water flowing on or past a reservation. Three of these disputes, San Luis Rey (California), Salt River Pima-Maricopa (Arizona), and Colorado-Ute (Colorado), were resolved through negotiated settlement by the parties and legislative authorization enacted by the 100th Congress.. Potentially, as many as ten additional settlements could come before the 101st Congress. Negotiation is preferred by the Administration and most other parties as a means of resolving claims, for it alleviates much of the cost, time and uncertainty involved in litigation.

AD HOC GROUP

The Ad Hoc Group on Reserved Indian Water Rights was established in 1982 in response to concerns about the length, cost and prolonged uncertainty of litigation. These concerns forestalled investment based on the availability of and rights to water, negatively impacting tribes, businesses, states and the nation. The Ad Hoc Group includes representatives of the Western Regional Council, Western Governors' Association, National Congress of American Indians, Council of Energy Resource Tribes, and Native American Rights Fund. The Western States Water Council and Department of the Interior have recently been ex officio participants in the Ad Hoc Group. The purpose of the Group is to promote negotiated settlement of Indian water rights disputes in order to assist Indian economic development and to clear the cloud of uncertainty affecting rights because of unquantified Indian claims.

In recent years, the Ad Hoc Group has encouraged Congress and the Administration to establish and institutionalize a capability for facilitating negotiation of Indian reserved water rights claims. In 1988, three settlements were presented to Congress for approval, and negotiations are progressing on a number of others.

WORKSHOP

On December 7, 1988, the Ad Hoc Group and the Western Senate Coalition jointly sponsored the second Workshop on Indian Water Rights. The purpose of the workshop was to assemble a small group of key officials and interests to discuss the lessons learned as the San Luis Rey, Salt River Pima-Maricopa and Colorado-Ute settlements made their way through the 100th Congress. Other discussion items included off-reservation use and lease of Indian water, federal cost-share policy, potential settlements during the next Congressional session and recommendations to the transition team, new Administration and Congress. The workshop was co-chaired by Governor Mike Sullivan of Wyoming (the Western Governors' Association lead

Workshop on Indian Water Rights
Participants
Page 2

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~~Central Arizona Project Association~~

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~~U. S. Department of Interior~~

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Transition team

Dan Beard
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Domenici's office

governor on Indian water rights), Judy Knight (Chair, Council of Energy Resource Tribes) and Ralph Cox, President of Union Pacific Resources Company (Chairman of the Western Regional Council Reserved Water Rights Committee). A copy of the agenda for the workshop and a list of the participant and observer attendees is attached.

This was the second such workshop. The first, held in May 1988, reviewed a series of twelve issues generally affecting ongoing settlement negotiation. Copies of the report from the first workshop are available from WGA.

FUTURE ACTIONS

A report defining the legal status and marketability of various types of rights will be developed by the Western States Water Council, Native American Rights Fund and Western Governors' Association. Workshop sponsors were also encouraged to prepare an inventory of potential settlements. Development of confirmation hearing questions for the new Secretary of the Interior was also proposed. Participants agreed that they benefited from this workshop and the lines of communication that were developed or enhanced among those interested or involved in the issue. Attendees were in favor of scheduling a future workshop with slightly broader representation, including more state and resource representatives.

SUMMARY OF DISCUSSIONS

The "common threads" and most valuable lessons to arise from the discussions at the workshop are summarized below.

I. The Congressional Consideration Process

a. While parties presented a "final" settlement to Congress, negotiations were reopened in Congress to take into consideration the new players (members of Congress, state interests not party to the negotiations, parties in other negotiations concerned about precedent) and their legitimate concerns;

b. The past Administration offered little support or constructive input to Congress and the tribes during the congressional consideration process;

c. In addition, the U.S. role was not always internally coordinated;

d. Although most settlements will include marketing provisions, Congress is not yet ready to approve unfettered marketing of water. Too many legal questions surround the status of various rights, the impact of marketing on river compacts and allocations, the propriety of allowing a profit from a federally developed resource, etc. Of most interest to Congress is where the marketed water will be used and the impacts on established uses;

e. Successful settlements will be those which come closest to meeting tribal needs without impacting established uses;

f. To increase prospects for congressional authorization, settlements should come to Congress with strong local support and few loose ends.

II. Funding and Cost-Sharing Considerations

a. Most parties feel that OMB's proposal to limit federal settlement contributions to the federal government's litigation exposure is unacceptable as it ignores the federal trust responsibility;

b. Because of the number of potential settlements, OMB is questioning whether settlements should be treated as a de facto program, complete with criteria outlining the role of OMB in negotiations, consistent funding parameters and cost-sharing guidelines;

c. In each of the settlements approved by Congress in 1988, federal contributions reflected the economic situation of the tribes, not the limit of claims;

d. Cost-sharing considerations should include: litigation exposure, litigation costs, "wet" versus "dry" water rights, allocation of benefits, the trust responsibility, advancement of federal policy favoring negotiated settlement, federal negligence and historic commitment, tribal self-determination, economic self-sufficiency, non-federal litigation exposure and capability, fish and wildlife, wetlands protection, navigation, water quality, hydrogeneration, the national debt and budget pressure, certainty, etc.;

e. The responsibilities and benefits for all parties should be considered in cost-sharing considerations.

III. Recommendations and Future Actions

a. The next Secretary of the Interior should make it a priority both to facilitate and to provide guidance as settlements proceed through Congress. A permanent contact should be established at the under-secretary level. This would provide a forum for ongoing federal consultation and help resolve the conflicts between the multiplicity of federal hats (funding, water user, trustee, litigator) during settlement.

b. Guidelines for final negotiated agreements should be developed so that negotiators know what the "strike zone" is prior to structuring settlements;

c. In order to facilitate water marketing, answers must be developed to clarify and define legal questions about the propriety of allowing a profit from a federally subsidized resource, appurtenancy, basin allocation, beneficial use, the status of reserved, treaty, aboriginal and state rights, etc.

SUMMARY OF AGENDA SESSIONS

SETTLEMENTS IN THE 100TH CONGRESS

Introduction

Three Indian water rights settlements, San Luis Rey (California), Salt River Pima-Maricopa (Arizona) and Colorado-Ute (Colorado), passed the 100th Congress in 1988. All three of these settlements had been worked out in local negotiations, yet Congress changed each of them substantially. During the workshop a brief overview of the final settlement legislation was given, along with a comparison of the settlements and how they addressed the twelve issues discussed at the May 1988 workshop. Discussion focused on the lessons learned.

Discussion

Negotiators must understand that local agreements are only proposals to Congress and that negotiations continue in Congress. Introduction in Congress is when the original parties encounter other parties with legitimate interests. Negotiators need to understand that further compromise will be necessary if authorization legislation is to be enacted.

Once the three settlement bills were introduced in Congress, the Administration appeared to become increasingly distant, providing little support and few guidelines to either Congress or the tribes. The next Secretary of the Interior should make it a priority to provide guidance and follow the settlements through Congress. However, it is important to realize that these settlements impact a broad range of concerns and it is unrealistic to expect the Administration to be able to reconcile all the different viewpoints.

Conclusion

Local parties must approach Congress with a strong case for settlement and strong local support. However, during the Congressional consideration process, substantial changes will probably occur. Negotiators should place more emphasis on Congress. The Administration must better define its role in settlements, unify its various offices and support the tribes throughout the entire process in fulfillment of the national trust obligation.

Recommendations arising from the discussion include the development of settlement guidelines, so that negotiators know what the "strike zone" is prior to structuring settlements, and the development of methods for earlier involvement of Congress. An ongoing consultation process is needed to link the various agencies which comprise the U.S. government. An office which would provide a forum for discussion would alleviate misunderstandings and facilitate the process. One recommendation was the establishment of a point of contact at the under secretary level of the Department of the Interior. That contact would have jurisdiction over Indian water rights, and would represent the Administration and follow the settlement process through enactment and appropriation.

OFF-RESERVATION USE AND LEASE OF INDIAN WATER

Introduction

The inclusion of this topic arose in part from the recommendations of participants at the May Workshop on Indian Water Rights. Off-reservation lease of tribal water is controversial, yet resolution of this issue is central to the settlement of many claims. Each of the 1988 settlements approached the question differently, with the Congress placing restrictions on the tribes.

The San Luis Rey settlement has no explicit off-reservation leasing authority, although the Act allows the parties to the settlement to divide among them both the local and supplemental water supplies and provide other considerations as a part of the settlement agreement. The Salt River Pima-Maricopa settlement approved a 99 year lease of the tribe's Central Arizona Project contractual water requirement for use by cities in the Phoenix area. The Colorado Ute settlement authorizes the Southern Ute and Ute Mountain Ute tribes to lease water off reservation. Such leases involve both Winters and Bureau of Reclamation contract water. When leased for use off-reservation, the water will be used in accordance with applicable state law. Once off-reservation use ceases, the water rights will revert to the reservation.

Discussion

As evidenced by the marketing limitations and provisions in the San Luis Rey, Salt River Pima-Maricopa, and Colorado-Ute settlements, Congress is not ready to approve unfettered marketing of Indian water. Too many unanswered questions exist and the legal and practical issues have not been sufficiently thought out. However, from the Indian perspective water marketing is an extremely valuable resource and tool for economic development. States see transfers as enhancing efficiency and, therefore, beneficial if provisions are included to protect existing uses. OMB favors marketing as it would provide additional settlement options and financial resources, thus easing the squeeze on the federal budget.

Dissenting views focus on the uncertain nature of reserved rights and whether or not rights based on Indian reserved water claims have the same transfer rights as non-Indians water. The special nature of reserved Indian rights could give this water senior status which, if marketed off-reservation, would disrupt existing uses. The legal implications of marketing different types of water (aboriginal, reserved, treaty, etc), the impact of marketing upon basinwide allocation, and beneficial use criteria will have to be determined. The final destination of transferred water has many implications for the political acceptability of the transfer, and Congress would probably want to know where the water would be going prior to giving approval in a settlement.

A point was also raised that tribes should not have to sell a valuable resource to fund settlements, and that transfers should not be counted as a tribal contribution to settlement. Rather water marketing should be considered a valuable tool, producing capital for economic development on reservations, while putting water from existing systems to its most valuable use.

Conclusion

At this workshop most participants recognized that most settlements will have to include some marketing provisions. Considerations would have to be on a case-by-case basis, with use procedures defined state-to-state. Concern was expressed that leasing provisions protect other existing uses. It was also agreed that it would be useful to clarify and define the confusion and legal questions about (1) the propriety of allowing a profit from a federally subsidized resource, (2) appurtenancy, (3) basin allocation, (4) beneficial use requirements, and the status of reserved, treaty, aboriginal and state rights.

FEDERAL COST SHARE POLICY

Introduction

When determining the federal cost share in Indian water rights settlements, OMB presently begins with an estimate of the federal government's legal exposure in litigation, then evaluates each negotiated settlement on a case-by-case basis which allows for consideration of various program needs, including the federal trust responsibility. However, OMB has proposed limiting the federal contribution to federal legal liability as a means of coping with the reality of a shrinking federal budget. This is opposed by most other parties who feel that the trust responsibility extends beyond litigation exposure and that there is a need to repair the damage from earlier inattention on the part of the trustee. Most participants also agreed that outside parties benefitting from these settlements should bear a portion of the costs for both resource and reservation development.

Discussion

The cost-sharing considerations which must be considered by the federal government are: litigation exposure, litigation costs, "wet" versus "dry" rights, allocation of benefits, the trust responsibility, the advancement of the federal policy favoring negotiated settlement, federal negligence and historic committment, self-determination, self-sufficiency, fish and wildlife, wetlands protection, navigation, water quality, hydrogeneration, the national debt and budget pressure, and certainty. Of these, the trust responsibility, advancement of the federal policy favoring negotiation, federal negligence and historic commitment, self-determination, and self-sufficiency are wholly federal considerations. They are national goals, the responsibility of the federal government as a legal trustee, and therefore a significant part of the justification for spending above litigation exposure. The budget pressure arising from the national debt and certainty of water rights for strategic minerals development were also noted as wholly federal interests.

Local capability and the economic viability of the tribes should be considered above and beyond federal liability, and those tribes needing more financial assistance to achieve economic health should receive more support. Many of the costs to the U.S. arising from maintaining Indians, such as high unemployment and welfare payments, could be reduced with settlements which provide opportunities for economic development. Other "spin-off" benefits include certainty of rights for all parties and better use of presently underemployed resources, both of which will encourage greater economic health in Indian country and provide substantial benefit to neighboring areas and affected states. Protection of existing non-Indian uses must also be factored into cost-sharing arrangements.

Parties to these settlements must realize, however, that because of the number of potential settlements, OMB must treat them as a de facto program, complete with criteria outlining the role of OMB in negotiations, consistent funding parameters, and cost-sharing guidelines for the federal government and others. Additionally, Indian water rights claims must be prioritized within the fixed federal budget.

Conclusion

All responsibilities and benefits must be included in cost-sharing considerations. Reservation economic development is consistent with the trust responsibility and self-determination and benefits local and state interests as well. Thus federal support should extend beyond litigation exposure, with additional contributions from the benefitting local and state players. Foregone revenues and contributed assets should be counted toward cost-sharing.

POTENTIAL SETTLEMENTS IN THE 101ST CONGRESS

Introduction and Discussion

Approximately 50 Indian water rights cases are amenable to settlement. The average cost of these is estimated to be $50 million each for a total of $2.5 billion. Eleven settlements currently have serious negotiations underway and could be presented in the 101st Congress. These are: Chui-Chu (Arizona), Unitah and Ouray (Utah), Warm Springs (Oregon), Shoshone-Bannock (Idaho), Northern Cheyenne (Wyoming), Jicarilla (New Mexico), Pyramid Lake (Nevada and California), Fort McDowell (Arizona), Yakima (Washington), Gila River (Arizona) and Garrison/Fort Berthold (North Dakota). Warm Springs and Shoshone-Bannock appear most likely for the upcoming session.

Lawsuits have certain advantages over negotiated settlements in that they create finality, bind the parties and avoid a taking. However, participants agreed that in most situations, negotiated settlement is preferable to extended litigation. The proposed OMB policy to limit federal contributions to litigation and budget exposure suggests that tribal litigation against the United States is a prerequisite to negotiation. Yet, as the policy of the U.S. is to promote negotiation over litigation, questions of whether or not tribes must file a lawsuit against the U.S. prior to entering negotiations must be cleared up.

Conclusion

A successful settlement will be that which best meets tribal demands and needs without adversely impacting established uses. A redefinition of the role of the United States in settlements is desired by many, with the emphasis being on participation and observation, rather than facilitation.

WORKING WITH THE TRANSITION TEAM, NEW ADMINISTRATION AND CONGRESS

Introduction

The passage of three settlements in 1988 has raised interest in Indian water rights issues. The change in administration and beginning of a new Congress provides opportunities for reaffirming the need for an Indian water rights program and for making recommendations about coordinating and structuring settlements to the key governmental officials.

Discussion & Conclusion

A meeting with the new Secretary of the Interior by the Ad Hoc Group to advocate the designation of a high-level official (possibly the under secretary) as the federal government coordinator on Indian water rights issues was proposed. The establishment of a permanent contact within the Administration would alleviate the multiplicity of U.S. hats (funding, water user, trustee, litigator) and provide continuity at the negotiating table and before the Congress. Manpower and budget allocations would also be presented. An out-of-agency task force and a program identifying out 4 or 5 settlements to be presented to Congress was also suggested. Tribal leadership should work with the new Administration to gain appropriate recognition of their concerns.

WESTERN SENATE COALITION/
AD HOC GROUP ON RESERVED INDIAN WATER RIGHTS

WORKSHOP ON INDIAN WATER RIGHTS

Washington Court Hotel
Montpelier Room - Mezzanine Level
December 7, 1988

AGENDA

Wednesday, December 7, 1988

8:30 - 9:00	Continental Breakfast
9:00 - 9:15	Opening Session and Report on May Workshop
9:15 - 10:45	Settlements Enacted in the 100th Congress
10:45 - 12:00	Off-Reservation Use and Lease of Indian Water
12:00 - 1:00	Lunch
1:00 - 2:30	Federal Cost-Share Policy
2:30 - 3:00	Potential Settlements in the 101st Congress
3:00 - 3:30	Working with the Transition Team, New Administration and New Congress
3:30 - 4:00	Closing Session
4:00	Adjourn

WESTERN SENATE COALITION/ AD HOC GROUP ON RESERVED INDIAN WATER RIGHTS

WORKSHOP ON INDIAN WATER RIGHTS

Washington Court Hotel
Montpelier Room - Mezzanine Level
December 7, 1988

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Judy Knight
Chairman
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The Honorable Mike Sullivan
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Faith Roessel
Attorney
Native American Rights Fund

Phil Shimer
Washington Representative
Western Governors' Association

TRIBAL-STATE INTERIM SETTLEMENT AGREEMENT ON TAX AND WATER ISSUES

During the term of this Agreement, the Shoshone and Northern Arapaho Tribes (the "Tribes) of the Wind River Indian Reservation (the "Reservation") and the State of Wyoming (the "State") agree as follows:

1. Water on the Reservation is to be allocated (a) within the six (6) federal irrigation projects (Crowheart Unit, Ray Unit, Coolidge Unit, Johnstown Unit, Sub Agency Unit, Left Hand Unit) in accordance with the principle of equally shared surpluses and shortages, if any, in a manner that reflects traditional rotation practices for each such project, and (b) outside of the above projects in accordance with historical priority dates attached to the lands outside of such projects. In applying the principle of equally shared surpluses and shortages, if any, water shall be allocated to individual tracts of land based on the total amount of irrigated acreage in each tract, rather than the size or number of headgates for the particular tract.

2. The Tribes and the State, in coordination with the Bureau of Indian Affairs, shall cooperate in jointly monitoring and managing water allocations on the Reservation.

3. The State shall reduce its severance tax on oil and gas production on the Reservation from six percent to one and one-half percent.

4. The Tribes may amend the rate of their severance tax on oil and gas production on the Reservation. The tribal tax rate is now equal to four percent plus the current state and county rates of taxation. The amended tribal rate shall not exceed eight and one-half percent plus the then-current state and county rates of taxation.

5. The Tribes shall not seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the Reservation, but the Tribes are free to participate as amici curiae in cases not involving the Reservation and as amici curiae in any refund proceedings involving taxpayers on the Reservation. The Tribes shall retain the current credit in the tribal tax on oil and gas production for state and county taxes paid by Reservation taxpayers.

6. The State shall provide $1,000,000 in grant funds for rehabilitation and expansion of existing water delivery systems within the Reservation. In consultation with the State Engineer, the Tribes shall define, develop budgets for, and prioritize the projects to be supported by these grant funds. As each such project is initiated, the

State shall disburse funds to the Tribes up to the above total amount in accordance with the budgets and priorities for the defined projects; provided, however, that the State's obligation to the Tribes under this Agreement as to any unspent funds shall terminate on March 31, 1994. The Tribes shall return to the State any funds not spent in accordance with the above budgets and priorities.

7. The Tribes, in consultation with the Bureau of Indian Affairs, shall establish a fund and procedures for compensating Indian water users for possible losses arising from the accommodations provided by the Tribes in Paragraph 1. The State shall provide $2,000,000 in cash to the Tribes for use in this compensation fund, and any amount not allocated to the fund may be expended for such other purposes as the Tribes may decide. The payment from the State shall be due within thirty days of the effective date of this paragraph of the Agreement.

8. The State shall provide $300,000 to be used to fund a reconnaissance study of potential water storage sites on the Reservation and a study of improvements needed for the rehabilitation and expansion of existing water delivery systems on the Reservation. These studies shall be conducted for the Tribes and the State by a consulting firm or other entity, and according to terms, mutually

agreed upon by the Tribes and the State. If feasible, such studies shall be completed no later than October 1, 1989. If the Tribes are able to arrange alternative funding in whole or in part for these studies, or if the cost of these studies is less than $300,000, the remaining amount committed by the State for these studies shall be added to the funds available under paragraph 6 of this Agreement for use in rehabilitating and expanding the existing water delivery systems on the Reservation.

9. The Tribes and the State shall negotiate in good faith to reach a long-term settlement of the tax and water issues on the Reservation.

10. If the Tribes and the State are able to reach a long-term agreement regarding the tax and water issues on the Reservation, the Governor shall support legislation needed to implement the terms of such agreement, including significant funding for rehabilitation of water delivery systems and pre-construction engineering studies for water storage sites. The Tribes and the State agree to cooperate in seeking federal funding to offset these costs.

11. The Tribes and the State shall create a committee by each appointing one representative to discuss

disagreements and issues arising out of this Agreement.

12. The effective dates of the terms of this Agreement are contingent upon obtaining the necessary approval of the Department of Justice and upon the enactment of implementing legislation by the State Legislature as follows: If the State Legislature has enacted implementing legislation by April 1, 1989, and the Department of Justice has not disapproved the Agreement as of that date, Paragraphs 1, 2, 3, 4, and 5 of this Agreement shall take effect on April 1, 1989, but shall cease to become effective if the approval of the Department of Justice is not obtained by May 1, 1989, unless this date is extended by written agreement of the State and the Tribes. The remaining paragraphs of this Agreement shall take effect when the State Legislature has enacted implementing legislation and the approval of the Department of Justice has been obtained; provided, however, that if such legislation is not enacted or such approval is not obtained before May 1, 1989, this entire Agreement shall become null and void, unless extended by written agreement of the Tribes and the State.

13. The various terms of this Agreement shall remain in effect for one year from the effective date of each such term as set forth in paragraph 12, except (a) as

provided in Paragraph 6 for the disbursement of unspent water delivery system funds, and (b) as provided in Paragraph 10 for the Governor to support certain legislation if the Tribes and the State reach a long-term agreement on tax and water issues; provided, however, that if there has been a material breach of the Agreement that is not resolved or reconciled by the committee described above in Paragraph 11, this Agreement may be terminated by the non-breaching party sooner than one year from the effective date or dates.

John R. Washakie
John Washakie, Chairman
Shoshone Business Council

Feb 17, 1989
Date

Burton Hutchinson, Chairman
Northern Arapaho Business
Council

Feb 17, 1989
Date

Mike Sullivan, Governor
State of Wyoming

Feb. 17, 1989
Date

STATE OF WYOMING

EXECUTIVE DEPARTMENT

EXECUTIVE ORDER

1989 - 4

WHEREAS, it is the intent of the Governor of the State of Wyoming to recognize and respect sovereignty of the Shoshone and Arapaho Tribes;

WHEREAS, Tribal governments are more aware of the needs and desires of their members than is the State government. Tribal governments should, therefore, have the primary responsibility for meeting those needs while being responsive and accountable to their members;

WHEREAS, State and Tribal governments should work cooperatively in a manner which strengthens the concept of Tribal self government. Such cooperation is enhanced by a policy which affirms dealing with Tribes on a government-to-government basis;

NOW, THEREFORE, I, Mike Sullivan, Governor of the State of Wyoming, by virtue of the powers and authotity vested in me by the Constitution and laws of the State of Wyoming do hereby proclaim that the State of Wyoming and its officials and agencies hereby accept the fundamental principle and integrity of the government-to-government relationship between the State and the Shoshone and Arapaho Tribes, and that this principle shall be the basis of the State's Indian Tribal Governmental Policy.

GIVEN under my hand and the Executive Seal of the State of Wyoming this 5th day of April, 1989.

Mike Sullivan
Governor

STATEMENT OF WILLIAM P. HORN

Before the U.S. Senate Select Committee
on Indian Affairs

April 6, 1989

MR. CHAIRMAN. THANK YOU FOR THE INVITATION TO TESTIFY TODAY AND THE OPPORTUNITY TO DISCUSS INDIAN WATER RIGHTS SETTLEMENTS. FOR THE RECORD, MY NAME IS WILLIAM P. HORN AND I AM AN ATTORNEY WITH THE FIRM OF BIRCH, HORTON, BITTNER AND CHEROT. HOWEVER, FROM 1981 THROUGH 1985, I SERVED AS DEPUTY UNDER SECRETARY OF THE DEPARTMENT OF THE INTERIOR; DURING THAT PERIOD I ALSO SERVED AS THE CHIEF NEGOTIATOR FOR INDIAN WATER SETTLEMENTS WITHIN THE DEPARTMENT.

THE ACTIVE PURSUIT OF COMPREHENSIVE, EQUITABLE WATER SETTLEMENTS REMAINS A VERY WORTHY GOAL. MANY INDIAN TRIBES CANNOT REALIZE VITAL ECONOMIC GOALS UNLESS THEIR WATER RIGHTS ARE SECURE. SIMILARLY, THE ECONOMIC SECURITY OF OTHER INTERESTS AND COMMUNITIES IS OFTEN UNSETTLED BY PENDING TRIBAL WATER CLAIMS. SETTLEMENTS WHICH CLEAR THE AIR AND PROVIDE APPROPRIATE SECURITY TO ALL PARTIES ARE CLEARLY IN THE PUBLIC INTEREST. MOREOVER, SETTLEMENTS PROVIDE

AN EFFECTIVE MEANS FOR THE FEDERAL GOVERNMENT TO DISCHARGE ITS SPECIAL OBLIGATIONS TO INDIAN PEOPLE. ONLY MISDIRECTED FEDERAL POLICY WILL IGNORE OR FAIL TO SEIZE THE OPPORTUNITIES ATTENDANT TO NEGOTIATED WATER SETTLEMENTS.

THE COMMITTEE HAS REQUESTED THAT I DESCRIBE THE POLICY OF NEGOTIATED SETTLEMENTS AND THE MANNER IN WHICH THAT POLICY WAS CARRIED OUT DURING MY TENURE AT THE DEPARTMENT. THE FOLLOWING DESCRIBES THE POLICY STRUCTURE THAT WAS CREATED WITHIN THE DEPARTMENT, THE POLICY CRITERIA THAT WERE ESTABLISHED, AND THE NEGOTIATING PROCESS THAT WAS EMPLOYED. IN ADDITION, THE STATEMENT INCLUDES MY OBSERVATIONS AND RECOMMENDATIONS REGARDING POLICY AND PROCESS FOR THE NEW ADMINISTRATION.

STRUCTURE

THE INTERIOR DEPARTMENT'S WATER SETTLEMENT INITIATIVE WAS CREATED IN THE WAKE OF THE 1982 VETO OF THE ORIGINAL PAPAGO SETTLEMENT BILL. THE INTERNAL STRUCTURE CONSISTED OF A WATER POLICY GROUP CHAIRED BY THE SOLICITOR WITH MEMBERSHIP INCLUDING THE

ASSISTANT SECRETARIES WITH PROGRAM INTERESTS IN WATER MATTERS (I.E., ASSISTANT SECRETARIES FOR INDIAN AFFAIRS, WATER AND SCIENCE, LAND AND MINERALS, FISH, WILDLIFE, AND PARKS, AND POLICY, BUDGET AND ADMINISTRATION). THE ROLL OF THE POLICY GROUP WAS TO SET PRIORITIES; THAT IS, DETERMINE WHICH OF THE MORE THAN 50 PENDING WATER CLAIMS CASES WERE RIPE FOR A NEGOTIATED SETTLEMENT. IT ALSO WAS CHARGED WITH FORMULATING POLICY GUIDELINES TO BE APPLIED TO ALL PROSPECTIVE SETTLEMENTS. IN CONCERT WITH THESE GUIDELINES, IT WAS CHARGED WITH ISSUING NEGOTIATING INSTRUCTIONS RELATING TO PARTICULAR SETTLEMENTS. FINALLY, THE GROUP WAS TO PROVIDE A FORUM FOR RESOLVING SPECIFIC POLICY DISPUTES THAT AROSE IN THE CONTEXT OF SPECIFIC NEGOTIATIONS.

THE DEPUTY UNDERSECRETARY WAS DESIGNATED AS THE CHIEF NEGOTIATOR FOR CLAIMS SETTLEMENTS AND WAS TO OPERATE IN ACCORDANCE WITH THE INSTRUCTIONS ISSUED BY THE POLICY GROUP. AS THE CHIEF NEGOTIATOR, I HAD THE DISCRETION WHETHER OR NOT TO DIRECTLY PARTICIPATE IN SPECIFIC NEGOTIATIONS OR TO DESIGNATE APPROPRIATE

SURROGATES. IN ADDITION, I HAD THE AUTHORITY TO ASSEMBLE TEAMS OF INDIVIDUALS FROM THE DIFFERENT DIVISIONS AND BUREAUS OF THE DEPARTMENT TO WORK ON PARTICULAR PROJECTS.

POLICY

SPECIFIC CRITERIA WERE ARTICULATED TO ENABLE THE POLICY GROUP TO SELECT THOSE CLAIMS WHERE NEGOTIATION WOULD BE ACTIVELY PURSUED AND TO CRAFT NEGOTIATING INSTRUCTIONS. THE GROUP INFORMALLY ADOPTED SIX CRITERIA: (1) PARTIES WOULD BE AMENABLE TO NEGOTIATIONS; (2) A SETTLEMENT COULD TIMELY PROVIDE "WET" WATER FOR INDIAN TRIBES; (3) A SETTLEMENT COULD PRODUCE GENERAL PUBLIC BENEFITS; (4) A SETTLEMENT WOULD GENERATE COST SAVINGS COMPARED TO THE LIABILITIES ATTENDANT TO LITIGATION; (5) COST SHARING COULD BE PROVIDED BY THE NON-INDIAN BENEFICIARIES OF ANY SETTLEMENT; AND (6) SETTLEMENT WOULD RESULT IN FINITE U.S. LIABILITY.

PROCESS

PROSPECTIVE SETTLEMENTS WERE APPROACHED IN A STRAIGHTFORWARD MANNER. FIRST, EFFORTS WERE MADE TO DEVELOP A COMPREHENSIVE

DEPARTMENTAL POSITION REGARDING THE SPECIFIC CASE. STRATEGY AND OBJECTIVES WERE CRAFTED BY THE POLICY GROUP AND THE CHIEF NEGOTIATOR. A COST ESTIMATE WAS ESTABLISHED AND A PRIOR DETERMINATION WAS MADE WHETHER OR NOT THE EXPENDITURE NECESSARY TO ACHIEVE RESOLUTION WAS CONSISTENT WITH THE POLICY CRITERIA. DECISIONS ON THESE MATTERS BECAME THE BASIS OF AN INTERNAL DEPARTMENTAL COMMITMENT. LASTLY, GENERAL ADMINISTRATION SUPPORT FOR THE DEPARTMENT'S POSITION WAS SOUGHT AT AGENCIES SUCH AS JUSTICE AND THE OFFICE OF MANAGEMENT AND BUDGET. MOST OF THIS EFFORT OCCURRED BEFORE WE WENT TO THE BARGAINING TABLE OR BEFORE NEGOTIATIONS REACHED KEY DECISION POINTS.

THESE DECISIONS BECAME THE BASIS OF MY NEGOTIATING INSTRUCTIONS. FURTHERMORE, I WAS GIVEN AUTHORITY TO MAKE COMMITMENTS AT THE NEGOTIATING TABLE CONSISTENT WITH THESE INSTRUCTIONS; THIS AUTHORITY WAS CRITICAL TO OUR SUCCESS. IN THE CASE OF NEGOTIATIONS THAT I WAS OVERSEEING, IT WAS MY JOB TO ENSURE THAT OUR SURROGATE NEGOTIATORS ADHERED TO THE SAME APPROPRIATE INSTRUCTIONS.

THE FINAL ELEMENT IN THE PROCESS WAS TO KEEP KEY INTERESTS, THAT WERE NOT PARTY TO THE SETTLEMENT DISCUSSIONS, INFORMED DURING THE COURSE OF NEGOTIATIONS. THIS OFTEN INCLUDED STATES, INDIAN ORGANIZATIONS, AND KEY MEMBERS AND COMMITTEES OF THE CONGRESS. WE DILIGENTLY TRIED TO PURSUE A POLICY OF NO SURPRISES.

EXAMPLES

LET ME OFFER SOME EXAMPLES OF HOW THIS STRUCTURE, POLICY AND PROCESS WERE EMPLOYED. THE COMPOSITION OF THE NEGOTIATING TEAMS WAS DEPENDENT ON THE NATURE OF THE EXPERTISE THAT WAS REQUIRED AND THE OVERALL SENSITIVITIES OF THE PARTIES. THE AK-CHIN NEGOTIATIONS WERE TECHNICALLY COMPLEX AND TOOK A CONSIDERABLE AMOUNT OF TIME. WE ASSEMBLED A TEAM CONSISTING OF CAREER EMPLOYEES FROM THE BUREAU OF INDIAN AFFAIRS, THE BUREAU OF RECLAMATION, THE SOLICITOR'S OFFICE AND AN ECONOMIST FROM THE POLICY OFFICE, ALL UNDER MY PERSONAL DIRECTION. THE ABILITY TO DRAW ON ALL OF THE TALENT IN THE DEPARTMENT, NOT JUST FROM ONE BUREAU, WAS A KEY TO SUCCESS.

POLICY DISPUTES AMONG THE DEPARTMENT'S DIVISIONS AROSE ATTENDANT TO VIRTUALLY EVERY NEGOTIATION WE PURSUED. THE WATER GROUP PROVIDED THE FORUM FOR RESOLUTION OF SUCH CROSS-CUTTING ISSUES OR ENABLED US TO COGENTLY FRAME DIVISIVE ISSUES FOR PRESENTATION TO THE SECRETARY. IN THE FORT PECK SETTLEMENT, THE DEPARTMENT HAD A RATHER SPIRITED INTERNAL DEBATE OVER WHETHER OR NOT INCLUDE WATER MARKETING. A DECISION WAS ULTIMATELY MADE TO AUTHORIZE MARKETING AS PART OF THAT SETTLEMENT ALTHOUGH THE DECISION TO DO SO WAS HARDLY UNANIMOUS. ONLY A DEPARTMENT-WIDE FORUM COULD HAVE MADE SUCH A DECISION AND MADE IT STICK.

AS NOTED EARLIER, A CRITICAL ELEMENT TO SUCCESS WAS OUR ABILITY TO MAKE MONETARY COMMITMENTS. IN THE CASE OF BOTH THE PAPAGO AND AK-CHIN SETTLEMENTS, I WENT TO THE BARGAINING TABLE WITH SECRETARIAL AUTHORITY TO COMMIT, CONTINGENT ON FUTURE APPROPRATIONS, CERTAIN SUMS OF MONEY. THIS MOVED NEGOTIATIONS ALONG AND MADE IT FAR EASIER TO GET CONCOMITANT AGREEMENTS FROM THE OTHER PARTIES.

RECOMMENDATIONS

THESE EXPERIENCES HAVE PERSUADED ME THAT THERE ARE FOUR ESSENTIAL ELEMENTS TO THE PURSUIT OF SUCCESSFUL SETTLEMENT NEGOTIATIONS. FIRST, THE ADMINISTRATION MUST BE A PLAYER AND SHOULD BE ACTIVELY INVOLVED FROM THE BEGINNING. IF IT CANNOT PROVIDE LEADERSHIP, IT SHOULD, AT THE VERY LEAST, BE IN A POSITION TO INDICATE, FROM THE OUTSET, WHAT IS UNACCEPTABLE.

SECOND, THE ADMINISTRATION MUST BE IN A POSITION TO MAKE DECISIONS AND COMMITMENTS. IT CANNOT FACILITATE NEEDED SETTLEMENTS WITHOUT EXERCISING LEADERSHIP AND IT CANNOT LEAD WITHOUT BEING PREPARED TO MAKE APPROPRIATE COMMITMENTS OF RESOURCES. SUCCESS IS CONTINGENT ON ANY ADMINISTRATION'S ABILITY TO GET ITS ACT TOGETHER AND FORGE A POLICY FROM AMONG ITS DISPARATE DEPARTMENTS AND INTERESTS.

THIRD, THE DEPARTMENT'S NEGOTIATORS MUST BE POLICY LEVEL PERSONNEL. IT IS UNFAIR TO PUT NON-POLICY PERSONNEL, NOTWITHSTANDING HOW CAPABLE AND TALENTED THEY MAY BE, ON THE SPOT

IN SUCH A SENSITIVE POLICY ARENA. IT IS ALSO OFTEN DIFFICULT TO GET NON-POLICY PERSONNEL THE AUTHORITY NEEDED TO MAKE NECESSARY COMMITMENTS AT THE BARGAINING TABLE. IF AND WHEN THEY MAKE THOSE COMMITMENTS, IT CAN BE DIFFICULT FOR THEM TO PARTICIPATE DIRECTLY AND EFFECTIVELY IN THE DECISION-MAKING PROCESS WITHIN THE DEPARTMENT OR WITHIN THE ADMINISTRATION TO DEFEND THE DECISIONS THAT THEY HAVE MADE. LASTLY, THE PUBLIC AND INTERESTS FREQUENTLY DO NOT ACCEPT THE AUTHORITY OF AN INDIVIDUAL WHO LACKS AN APPROPRIATE TITLE.

FOURTH, THE NEGOTIATOR MUST HAVE SOLID SUPPORT FROM THE DEPARTMENT. A NEGOTIATOR WHO GETS HIS OR HER WINGS CLIPPED BY HAVING DECISIONS REJECTED BY THE DEPARTMENT OR THE ADMINISTRATION QUICKLY BECOMES A CRIPPLED ENTITY WHOSE EFFECTIVENESS IN SUBSEQUENT DEALINGS WILL BE GREATLY DIMINISHED. A SENIOR LEVEL OFFICIAL CAN USUALLY GUARD AGAINST THIS MORE EFFECTIVELY THAN CAREER PERSONNEL.

THE KEYS TO MAKING THE DEPARTMENT A KEY PLAYER IN THE RESOLUTION OF OUTSTANDING INDIAN WATER CLAIMS ARE VERY SIMPLE. A

DECISION MUST COME FROM THE TOP TO EXERCISE LEADERSHIP AND MAKE THE REQUISITE COMMITMENT TO BRINGING THESE OUTSTANDING CLAIMS TO SETTLEMENT. CONCURRENTLY, AN ACCOUNTABLE POLICY LEVEL PERSON MUST BE PUT IN THE LEAD AND PROVIDED WITH THE NECESSARY RESOURCES. ONCE THESE STEPS HAVE BEEN TAKEN AND THE PROCESS IS UNDERWAY, THE MAINTENANCE OF GOOD FAITH EFFORTS AND AN OPEN PROCESS THAT KEEPS CRITICAL INTERESTED PARTIES INFORMED WILL LEAD TO IMPORTANT SUCCESS. THERE IS TOO MUCH AT STAKE TO WARRANT DOING ANYTHING LESS.

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Statement of Michael J. Clinton
Before the Senate Select Committee on Indian Affairs

April 6, 1989

Mr. Chairman and members of the subcommittee, my name is Michael J. Clinton, and I am Vice President and Washington Office Manager for Bookman-Edmonston Engineering, Inc., a firm that specializes in water resources management. I am a professional engineer registered in the States of Arizona, California, Virginia and the District of Columbia. My testimony today describes my experiences with addressing Indian water rights issues while I was an employee of the Department of the Interior.

The Committee asked that Ann McLaughlin, formerly the Under Secretary of Interior and the Secretary of Labor, address the Committee. Because of long-standing travel commitments, Ann is unable to be here today. She sends her regrets, as she supports the work of the Committee to bring resolution to these long-standing disputes. On February 23, 1989, Ms. McLaughlin and I testified before the Subcommittee on Investigations. I am providing for the record copies of the testimony we presented, which describes the management and negotiating philosophies we used to address these controversies.

As you are aware, I served as Special Assistant to Under Secretary McLaughlin for about two years prior to joining the private sector in 1987. You heard Bill Horn's testimony describing his experiences as a Deputy Under Secretary. So that the difference in titles does not escape you, Bill was a political appointee while I was a career employee. In that capacity, I was able to observe and participate in Indian water right management during the terms of seven Secretaries of the Interior, from Rogers C. B. Morton to Don Hodel. All tried to avoid becoming involved in the Indian water issues and none escaped. The trustee role rests on the Secretary's shoulders and forces executive decisions.

From a career employee's perspective, these Secretaries had varying success -- some who had their hearts in the right place were miserable failures, while others were successful without focusing hardly any personal energy on the subject. In my estimation, the differences are more in terms of management approach than personality or personal commitment. Those who managed to assure that day-to-day business was handled expeditiously were successful, while those who tried to focus on "the bigger picture" or narrow aspects of the Department's operations were less effective.

The career employees inside of Interior learn to manage change. The average tenure of a political appointee is about 18 months. What this means is that the "half life" is about nine months and therefor, in that time frame, five of the ten political appointees who oversee that individual's work will be replaced.

A part of coping with this turnover is to continually reeducate, join forces with the competent appointees, and tolerate the others. My work with then Under Secretary McLaughlin reflected the collaboration of a competent appointee using me as a window into the bureaucracy. Conversely, Ms. McLaughlin was my window into the policy decision process. The results of that collaboration speak for themselves.

My experience at Interior and in the private sector has shown that any government program must have two elements to survive. These are (1) an advocacy group which is mobilized to effectively represent the beneficiaries of the program, and (2) an internal capability within the bureaucracy that will sustain the "institutional memory" while political appointees change. For the Indian water claims settlement program, Ms. McLaughlin and I set about to assure the existence and health of each. Within the Department, training programs were conducted for career staff to build a cadré of internal capability. We also worked very closely with the Ad Hoc Group, that previous witnesses described today, to assure that their advocacy was mobilized and focused. Although the Administration lowered the intensity of the negotiation program after our departure, ongoing negotiations and settlements nearing completion suggest that the program continues to function effectively. The new Administration faces a challenge to reinvigorate that program.

As this Committee considers possible recommendations to the Administration on management of an Indian water claims settlement program, you may wish to consider the following:

- Settlements require a strong legal capability in Indian water law since effective trusteeship mandates negotiation from a position of strength. The Department needs to protect and enhance that capability.

- The representation of constituency interests by agency personnel, while important, cannot take the place of the affected parties providing input to secretarial decision processes. A process to assure participation by affected interests is essential.

- Cross cutting conflict needs to be addressed in neutral forums. Nowhere in the Department, but in the Office of the Secretary, do you have a forum where parochial interests would not influence settlements toward a process or result which is particular to that form.

- If settlements are to be effective, funding of the Federal commitment is essential. The Administration and the Congress need to establish cost sharing and funding procedures which remove the fiscal uncertainty while retaining the flexibility needed for effectively resolving these controversies.

This concludes my testimony. I would be pleased to respond to any questions.

Statement by Michael J. Clinton
before the U.S. Senate Select Committee on Indian Affairs
Subcommittee on Investigations
February 23, 1989

Mr. Chairman and members of the Committee, my name is Michael J. Clinton, and I am Vice President and Washington Office Manager for Bookman-Edmonston Engineering, Inc., a firm that specializes in water resources management. I am a professional engineer registered in the states of Arizona, California, Virginia and Washington, DC. During the bulk of my 25 years of Federal service I was a career employee of the Bureau of Reclamation dealing with water supply, water quality, and water rights management in much of the west. I served as Special Assistant to the Under Secretary for approximately two years prior to joining the private sector in 1987. My testimony today describes the concepts, techniques, and goals used in developing negotiated Indian Water Claims Settlements during the time I worked with Under Secretary Ann McLaughlin.

Basic to the approach was Under Secretary McLaughlin's philosophy that Indian water claims disputes are disputes among neighbors brought on largely by historical actions of the U.S. The 50 or so outstanding disputes include many examples of western rivers where water was implicitly reserved for Indian purposes and was then allocated to non-Indians. Neighbors have been set against each other competing for an over-subscribed water resource across many of the western states. All three settlements approved by the 100th

Congress have elements of this phenomenon. Mrs. McLaughlin sent Departmental negotiators to the bargaining table as facilitators with a strong mandate to build a local Indian/non-Indian coalition that could sustain the settlement through the process of negotiations, legislation and implementation.

I'll give you some personal examples of how this facilitator role worked for the Salt River Pima-Maricopa and Colorado Ute settlements. After commuting to Phoenix for six months of hostile meetings and shuttle diplomacy, it was rewarding to see Indians and non-Indian water users working together to craft what is now the Salt River Pima-Maricopa Settlement. A similar process took place in southwest Colorado. The states and Members of the Congressional delegations provided valuable assistance by encouraging Indians and non-Indians to co-exist. As the coalitions strengthened, the Federal role changed from facilitator to participant. Probably my toughest assignments were to tell the Salt River and Colorado Ute groups that they were far from an acceptable cost share package and to see their unity, that I had helped create, expel me as the Federal representative. They jointly went their own way taking control of the settlement, which the theorists tell me is a sign that the facilitator did a good job.

Cost-sharing on Indian settlements was a most difficult aspect, as reflected by the confrontations we witnessed in negotiations and at the end of the last Congressional session. The Department's perspective was that there was a Federal obligation at least as large as what the United States would spend without a settlement. Further, the Department believed that additional investments were needed on Indian reservations to turn "paper" water rights into "wet" water which could provide livelihoods and economic opportunities for the Indian peoples. We encountered significant opposition within the Administration to this philosophy.

To address this concern, Mrs. McLaughlin opened a dialogue on coordination and funding procedure with staff and policy-level personnel at the Interior, Office of Management and Budget, and the Department of Justice. To that end, a letter was sent in June, 1986 from Interior to OMB Director Miller describing the coordination and funding strategies that Interior would use for water claims negotiations. During 1986 there were many meetings with OMB and Justice and no cloture was ever achieved on the subject of an Administration cost-sharing policy. Interior continued to insist on a case-by-case, cost-share approach. OMB continued to insist that the United States should invest no more than its fiscal liability. It is my understanding that those discussions continued through the end of the Reagan Administration without cloture.

During 1986 we had as many as ten negotiating teams operating out of the Department. These were comprised of career staff from the agencies where programs would be affected by a settlement. One problem with the facilitator role for Department negotiators was that very talented engineers, attorneys, and economists had little understanding of negotiating techniques, group dynamics, or group process. To build a cadre of Interior staff for negotiating teams, we retained a contractor to provide necessary training. Interior professionals saw that, like other professions, sociologists have a "cookbook" showing how to facilitate resolution of conflicts. The training was a success, and the techniques continue to be used by those Interior staff involved in negotiations.

The management control on the negotiating teams was handled in the same manner as other Water Policy Working Group activities. My role was to oversee the working of the negotiating teams and bring to the working group issues needing policy consideration. Written and/or oral reports were made at working group meetings. Negotiating team leaders brought forward cross-cutting issues for policy consideration and guidance. In this way, each Assistant Secretary had the opportunity to represent the interests of the various agency constituencies, and decisions reflected that input.

One particular decision of this nature sticks in my memory. The Department was under court order to come up with operating criteria for a Reclamation project, the decision affecting Indian rights, endangered species, and water for farming. For months the issue had been hotly contested among the Solicitor, Fish and Wildlife Service, Reclamation, and Indian Affairs. On a Friday evening at

5:00 p.m., the Under Secretary invited the players, policy, and staff into her conference room for a final decision meeting. Popcorn was provided, and the group was told they would stay until a decision was reached. The Department's objectives were described by the Under Secretary and, much to everyone's surprise, the group found consensus in less than an hour. The stipulations were filed the next week, meeting the court deadline. Behind the scenes during the previous months of argument, the solution had been defined by listening to all sides in the Water Policy Working Group meetings. By hearing the common threads of respective arguments, the Department's objectives were clarified, and the issues needing decision became very narrow. What some called serendipity was, in reality, expertly managed process.

My experience at Interior suggests to me that the tremendous body of talent within the Department is an asset that can be used to resolve many of the Indian water claims disputes in the western states. For that staff talent to be effective, the management of the Department needs to have a process whereby technical and policy issues can be surfaced and resolved quickly. My experience with the Water Policy Working Group suggests that that model worked quite effectively, partly because of the process, but also because of the group management skills of the Under Secretary. I was pleased to be part of the process.

I thank you for the opportunity to provide my insights to the Committee. I also would be pleased to respond to questions as you desire.

Statement of Ann McLaughlin
before the U.S. Senate Select Committee on Indian Affairs
Subcommittee on Investigations
February 23, 1989

I want to thank you for inviting me to testify before you. I commend you, for the work you are doing is essential. If this Nation's Indian people are to escape the cycle of poverty that continues to strangle their self-determination and economic development, the management of the Federal trust responsibility needs tremendous improvement.

You have requested that I describe my experiences with managing Indian trust responsibility while at Interior. To understand how the trust responsibility fits with other programs at Interior, I often tell a story of an apocryphal river recently discovered in the western states. The question of what to do with this recently discovered river was brought to the Secretary. Reclamation wanted to divert it and grow high-value crops with the water, the Fish and Wildlife and National Park Services wanted it left in its pristine condition, the Geological Survey wanted to measure and study, while Bureau of Land Management and Minerals Management Service wanted to lease the bed of the river for mineral, oil and gas development. The controversy was resolved when the Solicitor opined that the river was owned by Indians -- and the Indians hadn't decided what they wanted to do with this resource.

This dilemma of agencies in the same Department having conflicting mission responsibilities is unique to Interior. In other parts of the Federal government where I have worked, the agencies in a Department have complimentary objectives; and the challenge is not what to do but how to accomplish the mission in the most expeditious fashion. At Interior, effective management requires identifying and surfacing the conflicts to assure that decisionmakers have the full range of viewpoints on an issue. In many cases we encountered serendipity where, through the dialogue process, we found consensus.

To have a forum for these discussions, I created the Water Policy Working Group, comprised of the Assistant Secretaries, the Solicitor, and chaired by the Under Secretary. We used water because it is an integral part of so many of the cross-cutting conflicts within Interior. This group met regularly and dealt with such issues as Dam Safety, Ground Water Policy, Indian Water Claims Settlements, Efficiency of Water Use, Wetlands Policy and the National Water Quality Assessment.

For the group to work effectively, it was essential that the respective Assistant Secretaries assume an advocacy role on behalf of their constituencies. I understand that you heard this morning from Ross Swimmer, Tim Vollman and others. I am pleased to report that in the Water Policy Working Group meetings, Ross was an able, effective, and often persuasive spokesman for the Indian viewpoint, a fact that some Indian people don't recognize. Also, Tim Vollman and his staff provided the legal analyses that resulted in the Water Policy Working Group being what I consider to have been "an honest broker" for Indian water issues.

I want to dwell on this point of confrontation for a moment because it is very important to the deliberations of this Committee. Human nature leads us to avoid pain. The encounters in the Water Policy Working Group were often painful. I have been in four Departments, and career service people are eager to help and follow the policy directions of political appointees if those appointees communicate with them where they are trying to go. So, reaching down into the bureaucracy to identify, surface, and resolve those cross-cutting conflicts was, in my estimation, the key to our successes in Indian Water Claims Settlements and in other areas. If the lead responsibility for addressing a cross-cutting issue is delegated to an Assistant Secretary whose constituency has a stake in the outcome, that Assistant Secretary will avoid the pain of confronting the enemy. The resultant outcome will not represent fairness, equity, or possible consensus.

With Indian issues, the lead Assistant Secretary concept results in far more pernicious discrimination. This is because the political maturity of the Indian peoples is not on a par with the sophisticated lobbying we see from other constituencies. When an energy company, conservation organization, or irrigation district sees their Assistant Secretary failing on their behalf (and they know exactly what is happening) they marshall other political forces to support their cause. Indian peoples don't have the networks, contacts, or political clout to make a difference if their advocate can't get their position to the decision table. Thus, any management approach which does not assure a level playing field and a process for honest brokering will be far more disadvantageous to Indian peoples than to others.

I know you would like to hear about the process we used for Indian Water Claim Settlements. I have with me today Mr. Michael Clinton who was my Special Assistant and managed the Department's Indian Water Claims Settlement Program under my direction. The Salt River, Colorado Ute and San Luis Rey settlements passed by the Congress last year reflect his quiet, adept management of that program. I will have Mike Clinton describe the settlement negotiation process for you in depth in a moment.

However, before I close I would like to share one further perspective. As I thought over what I might say to you today, I pondered the many glimpses of your challenge which I have seen. As an administrator, a generalist, and a participant in the public policy process, I have had a look at the role of government in our lives through many windows: at EPA, in the private sector, at Treasury, Interior, Labor, academia, and now in a non-profit think tank, the Urban Institute. Our focus while I was at Interior was primarily on how to protect Indian natural resources. We hoped that the results would be promotion of tribal self-determination and economic self-sufficiency. My experience as Secretary of Labor suggests that we may have been treating the symptom rather than the problem.

Indian communities have vast natural resources of land, water, minerals, oil, gas, coal and uranium which the Interior Secretary must protect as part of his/her trust responsibility. However little or no attention is given to the more important resource of the unemployed, uneducated, poorly trained, and unemployable labor on Indian reservations. I believe that we should ask how the combined asset base of labor, education, infrastructure and natural resources can be managed to make these communities a productive part of our society.

This Nation is beginning to address, in a period of labor shortages, vastly changing demographics in an aging workforce. Such factors as a slower rate of growth and how to educate and train those who will be in demand need immediate attention. We are proud to say as a nation that we can offer a job to everyone who wants one if they are prepared. As we move to the 21st century, it seems to me that the challenge of educating and preparing our workers for the jobs of the future is as important on Indian reservations as it is in our non-Indian labor markets. I encourage this Committee to consider adapting the existing knowledge of labor market management in order to meet the Nation's Indian management goals. I believe this Committee must have more than a natural resources agenda.

Thank you for the opportunity to share my thoughts with you today. I'd be pleased to respond to your questions.

STATEMENT OF THE HONORABLE DUANE WOODARD
ATTORNEY GENERAL OF THE STATE OF COLORADO

It is a pleasure for me to appear before you today to express my views on the federal government's policy of negotiated settlements of Indian water rights claims, and the manner in which that policy is being carried out. I and many of my western colleagues place great importance on the negotiated settlement of Indian reserved rights claims. There are high social and economic costs involved in litigating these claims: the uncertainty and stress of the litigation pits non-Indian and Indian communities against each other; the litigation is protracted and expensive; and the judicial system is unable to fashion solutions which satisfy the resource needs of the litigants. When the quantification of the Tribal claims to reserved rights is completed in the courtroom, Tribes are still faced with the problem of getting wet water to their reservations.

So important is the negotiated resolution of Indian claims to western Attorneys General that the Conference of Western Attorneys General supported a lengthy study of the issue. This study culminated in a settlement manual written by the then Director of the Conference of Western Attorneys General, a manual which is intended to be used to facilitate negotiation of Indian reserved water right claims.

The negotiation of the Indian reserved water rights claims in Colorado is also an area of importance to me, one in which I have personal interest and expertise, having been involved in the complex and protracted negotiated settlement of the Southern Ute and Ute Mountain Ute Indian Tribes' reserved water right claims. The history of the Colorado negotiations leads me to believe that while the federal government professes to support a policy of negotiated resolution of Indian reserved water right claims, it is a policy which is not uniformly endorsed within the various federal administrative agencies and offices responsible for settling these claims. The lack of federal commitment in this area is reflected in the failure to establish a federal institutional framework and policy necessary to carry out the negotiated settlements. This is not a criticism aimed at the individual federal officials involved in the Colorado negotiation process. Indeed it is only through their hard work and dedication that we were able to reach the settlement that we did. Rather, it is a recognition of the institutional constraints under which they were forced to operate, constraints which restricted their ability to negotiate an agreement with the State and Tribes. A review of the history of the negotiation and continual renegotiation of the Colorado settlement is in order.

In 1976, the Department of Justice filed applications in the Colorado District Court in and for Water Division No. 7 to quantify the Ute Mountain and Southern Ute Indian reserved water rights. The federal filings included claims to water from over 25 streams and tributaries in southwest Colorado. These waters were, in many instances, already fully appropriated by municipalities and farmers in southwest Colorado and northwest New Mexico.

The negotiations over the Ute Indian Tribe claims to reserved waters began with a letter I wrote to the Tribal chairmen in 1984, inviting them to the negotiation table. When I wrote that letter I knew the process of uniting the diverse interests of the United States, the States of Colorado and New Mexico, the Southern Ute and Ute Mountain Ute Indian Tribes, the various water conservancy districts and the rural farmers and thirsty municipalities of southwest Colorado and northwest New Mexico would not be easy. Even with this foreknowledge I underestimated the enormity of the task. Not only did we have to reach a negotiated settlement of the Tribal claims to reserved waters, we also had to negotiate a cost-share agreement for non-federal participation in the construction of the Animas-La Plata Project. The Animas-La Plata Project was the cornerstone of the negotiations, since without this project there was and is insufficient water to meet the needs of the Indian and non-Indian communities. This project had been previously authorized by Congress in 1968, in order to help resolve the Tribal claims to water. In its 1985 Supplemental Appropriations Act, Congress required Colorado and New Mexico to enter into a cost-share agreement with the Secretary of the Interior as a condition to receiving an appropriation for the construction of the Animas-La Plata Project. Subsequently the Administration insisted that up-front financing/cost-share agreements be included as part of the negotiation of the Indian reserved water rights claims.

Full plenary negotiations involving all participants continued throughout 1985. In the fall of 1985, however, the parties reached an impasse with the Administration over the terms of the agreement. Consequently the non-federal participants began negotiating among themselves to develop a cost-share proposal to present to the federal government, along with a proposal to settle the reserved water rights claims of the Tribes.

In March 1986, the non-federal participants reached an agreement in principle with respect to the reserved water rights claims and non-federal cost sharing. This agreement in principle included all aspects of the settlement of the Tribal reserved water rights claims, including quantification of the Tribal claims to water from all of the rivers, joint administration of the waters, and a negotiated resolution of the legally and politically complex problem of off-reservation and out-of-state use of Tribal waters.

The non-federal parties then attempted to reach agreement with the federal government on the non-federal cost-share proposal and the negotiated water rights settlement. With hard work and long hours on the part of all involved parties, the June 30, 1986, deadline imposed by Congress for a non-federal cost-share agreement was reached. A Binding Cost-Share Agreement, approved by the Department of the Interior and Office of Management and Budget was signed by Ann McClaughlin for the Secretary of the Interior. This Agreement, however, was still contingent upon a final settlement of the Indian reserved water right claims.

Negotiations with the federal government on the terms of a final settlement agreement continued. Although these "negotiations" were initially only for "clarification" of the earlier March agreement, in reality it proved impossible to avoid revisitation and renegotiation of the settlement. After long hours spent and hard concessions made by all parties, agreement was reached with the Department of the Interior. Then additional negotiations had to be undertaken with the Department of Justice.

On December 10, 1986, a Final Settlement Agreement was signed by the Department of the Interior, the Department of Justice, the State of Colorado, The Ute Mountain Ute Indian Tribe, the Southern Ute Indian Tribe, The Animas-La Plata Water Conservancy District, The Dolores Water Conservancy District, The Florida Water Conservancy District, The Mancos Water Conservancy District, The Southwestern Water Conservation District, the City of Durango, The Town of Pagosa Springs, Florida Farmers Ditch Company, Florida Canal Company and Fairfield Communities, Inc. This historic Final Settlement Agreement called for, among other things, the enactment of specified federal and state legislation found necessary to implement select terms of the negotiated agreement. The federal legislation included the authorization and appropriation of a Tribal development fund, the waiver of the non-intercourse act, and the modification of select provisions of reclamation law. Again negotiations began: this time over the terms of the federal legislation. Once more critical aspects of the settlement were renegotiated and additional concessions made. Luckily, these efforts paid off and culminated in the passage of the "Colorado Ute Indian Water Rights Settlement Act of 1988" Pub. L. No. 100-585, 102 Stat. 2973 (1988). Many of the individuals present at this meeting were instrumental in getting this legislation enacted for the State of Colorado and the Ute Mountain Ute and Southern Ute Indian Tribes and we are very appreciative of their outstanding efforts on our behalf.

All conditions required of Colorado under the terms of the Final Settlement Agreement have been met. Colorado has begun construction of a pipeline to bring domestic drinking water to the Ute Mountain Ute Indian Reservation. Our share of the Tribal development fund has been authorized and appropriated. An escrow account for the state contribution to the Animas-La Plata construction costs is funded and in place.

Unfortunately, however, the negotiation process has been threatened and the Final Settlement Agreement placed in jeopardy, this time by the refusal of the federal administration to request funds sufficient to meet the financial commitment made to Colorado and the Tribes in the Final Settlement Agreement and Colorado Ute Indian Water Rights Settlement Act. And herein lies the essence of Colorado's concerns about the federal government's policy of support for negotiated settlements of Indian water rights claims and the manner in which that policy is carried out.

Despite the federal signing of both the June 30, 1986, Binding Cost Share Agreement, and the December 10, 1986, Final Settlement Agreement, as well as the Congressional enactment of the Colorado Ute Indian Water Rights Settlement Act of 1988, the federal administration has failed to provide the financial resources it committed in each of those documents to provide. This failure places the entire settlement in jeopardy, is grounds for voiding the agreement, and returns the parties to the same situation they were in when I wrote that letter in 1984, facing the prospect of litigation of the Ute Indian Tribes' reserved water right claims. The failure of the federal government to carry through with its commitments raises serious questions in our minds about the Administration's commitment to negotiated settlement of Indian water rights claims. Although I cannot speak for my western colleagues, I can only believe that the Colorado experience will make many of them hesitant to expend the necessary resources and time in negotiating their claims with the federal government.

I would like to reemphasize, however, the value of negotiating these claims and the strong state and Tribal commitment to these negotiations. I would strongly urge the federal government to similarly commit its time and resources. Litigation among non-Indians and Indians over the life-blood of their social and economic existence should never be viewed as an acceptable alternative.

With respect to the needed federal policies, I am firmly of the belief that the federal government first needs to establish criteria for the negotiation process which will guide the multiple federal executive agencies. This policy should establish, with specificity, the federal commitment to the process and define the federal trust obligation to the Tribes and the commitment owed by the federal government to states in resolving these competing claims to water. While states recognize the reality of the national budget and appreciate the fact that the federal government cannot provide the entire financial solution, states do expect the federal government to acknowledge that the federal trust responsibility to Indians, as well as the historic federal involvement in the development of non-Indian water rights in the west, creates a financial obligation in the federal government to contribute to the solution. This contribution should extend beyond merely litigating the Tribal claims to water.

Second, there should be a federal commitment to inventory and quantify Indian reserved water right claims and compile the necessary technical data which can be jointly used to quantify the Tribal claims to water. At the very least, the expensive "battle of the technical experts" which took place in the Big Horn adjudication in Wyoming should be avoided. This information would also expedite the settlement process.

Third, there is a need to designate a federal official who is fully authorized to speak for the federal government on both legal and financial matters throughout the negotiation process. I recommend that there be an individual within the Department of the Interior directly available to the negotiators, who reports directly to the Undersecretary of the Interior, and who can represent and bind the entire federal administration during the negotiation process. This individual, or someone else at the negotiation table, needs the authority to speak for the Office of Management and Budget and the Department of Justice. The negotiation team for the federal government should not consist of line attorneys or lower-echelon officials that cannot speak for or bind the agencies they represent.

Fourth, the Office of Management and Budget has never issued a policy, guidance, or standard for its fiscal participation in Indian reserved rights settlements. This needs to be established in advance of negotiation itself to remove uncertainty among non-federal participants.

Next, the federal government needs to recognize the uniqueness of each settlement agreement. There is no national model which can be followed in all cases. Individual Tribes and states that can compromise on issues not capable of compromise elsewhere should not be penalized for fear of establishing a precedent dangerous in other parts of Indian country or to other states. The specifics of each tribe's needs must be considered. The participating federal representatives should make a strong effort to be sensitive to local concerns and needs.

Finally, if the federal administration commits to a settlement, it should be prepared to uphold its end of the bargain. It is unconscionable to sign agreements and support legislation only to refuse, 2 months later, to provide the financial resources contemplated in those documents to be necessary to make the agreement final.

A large part of the frustration experienced by the State of Colorado during the negotiation of the Ute Indian claims was the fact that there are multiple federal agencies within Interior and outside Interior with which separate negotiations had to be conducted. Every time a concession was made with one and an agreement reached, we found ourselves back at square one and would be asked by the next federal negotiator to give up more. A federal policy which addresses the above-mentioned factors would alleviate these problems and would greatly improve the chances of negotiating the Tribal claims to reserved waters in the west.

SOUTHERN UTE INDIAN TRIBAL COUNCIL

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April 7, 1989

Senator Daniel K. Inouye
Chairman, Senate Select Committee
on Indian Affairs
838 Hart Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

We are writing in response to your invitation to present written testimony on Indian water issues. We are convinced that the long term welfare of our Tribe depends on the protection and development of our water supplies and we know that these issues are of equal importance to tribes throughout the West. The Committee is to be commended for its attention to this critical matter.

The Southern Ute Indian Tribe has been deeply concerned about securing its water rights for many years. On our Reservation, as on most reservations, water is necessary if the tribal lands are to become the permanent homeland envisioned at the time the Reservation was created. We are fortunate that in the 1930's the United States successfully adjudicated our rights to water in the Pine River and acting through the Bureau of Indian Affairs built a project for the use of those waters. Thus, we know first hand the benefits that water development can bring.

Until recently, however, the federal government has neglected its obligations on the other streams of the Reservation, neither quantifying or developing those waters. Although in 1968, with the strong support of the Tribe, Congress authorized the Animas LaPlata Project which would supply much needed water to tribal lands, lands belonging to the Ute Mountain Ute Tribe and to our non-Indian neighbors, funding was never provided to build the Project. Likewise, the United States made no effort to determine the amount of water to which the Tribe was entitled. Eventually, the State of Colorado attempted to force the adjudication of the tribal rights in state court. The United States Supreme Court agreed with the State and ordered the quantification of tribal rights to proceed in state court. See Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

Following that decision, the United States and the Tribe began the time consuming and costly work of preparing for trial.

In 1985, the State, the Tribe, the Ute Mountain Ute Tribe, the major non-Indian water users, and representatives of the Departments of the Interior and Justice, confronted with the painful job of fighting over a limited water supply, decided to examine whether the issues could be settled.

The culmination of that very difficult effort was the execution of the Colorado Ute Indian Water Rights Settlement Agreement, dated December 10, 1986. By passing the Colorado Ute Indian Water Rights Settlement Act of 1988, Public Law 100-585, 102 Stat. 2973, Congress endorsed the settlement and agreed to implement certain critical portions. It remains to be seen whether the settlement will be realized.

The Council has been deeply involved in these critical issues would like to share with you our hard earned perspectives.

1. In our view, the importance of protecting and developing tribal water resources cannot be overemphasized. Without water, the reservations, at least in the arid southwest, can never evolve into the intended tribal homelands.

2 Protection of the tribal water resources is and will continue to be very expensive. Those who would like to appropriate or continue to use water rightfully belonging to tribes are prepared to devote a great deal of time and money to their efforts. That is true whether the battleground is in the courts or the halls of Congress. Tribes need the resources to make it a fair fight.

   Although the United States, as trustee for the tribes, is responsible for the protection of tribal rights, its efforts are frequently hampered by inadequate funding and a general lack of commitment. This problem has been noted by the Supreme Court. See Arizona v. California, 460 US. 605, 651 n. 6 (1983). While there are many dedicated government employees who work hard to protect tribal interests, recent high level appointees in the Department of the Interior have, for the most part, been antagonistic to tribal water rights. In short, it is imperative that tribes whose rights are under challenge have the resources necessary to protect those rights. In the long term, the protection of those rights will not only result in the United States keeping its word, but will also assist the tribes in generating viable reservation economies.

3. While it is critical that tribes be provided with the resources to litigate the full extent of their rights, it is also important to recognize the benefits which can be obtained through settlement. The purpose of the reserved rights doctrine is to provide the water supplies needed to develop reservation economies. That result can be accomplished in a variety of ways and tribes should be able to choose how to best meet their own needs, provided they have the technical and legal advice required to make these difficult choices. To the extent that tribal needs can be met through cooperation with non Indian water users, that is an approach which should be available.

Only the affected tribe can determine whether a particular arrangement truly meets its needs. The value of cooperation as opposed to bitter legal fights, the advantages of a project in contrast to decreed but presently unusable water rights and a host of other issues are all questions which must be decided by the tribe whose rights, and future, are at stake.

4. It is also critical that Congress and the Administration meet their commitments to tribes who have entered into settlements which have been enacted into law. As you may know, although the Congress passed and the President signed our settlement legislation into law last fall, the President's budget did not include the development funds promised to us or the monies necessary to construct the Animas La Plata Project on the time schedule set forth in our agreement. We have devoted years to this effort and yet only a few months after passage of the implementing legislation, it appears that the United States may well renege on its commitments. The unfairness of such action is obvious and constitutes a tragic comment on the Nation's continued abuse of Indian rights and interests.

5. Of course, the ultimate purpose of the Winters doctrine is to provide tribes with the water so critical to the development of reservation economies. The federal government has fallen far short of its obligations in this regard. It is no answer to say that the budget will not allow further water development or that environmental concerns preclude new projects. Methods must be found to finance and build the facilities necessary for tribes to use their water. Without the development of tribal water resources, tribes will be forced to look outside their reservations for ways to survive. That is not what we were promised and not what we want.

In conclusion, it is apparent that the problems which exist in protecting and developing tribal water resources are many and that solutions will be difficult to achieve. We hope that your Committee will continue to search for the answers which are so critical to the future of tribes.

Sincerely,

Southern Ute Indian Tribal Council

Leonard C Burch

Leonard C. Burch, Chairman
Southern Ute Indian Tribe

cc: Scott B. McElroy

TESTIMONY OF WILFRED K. COLEGROVE, CHAIRMAN
HOOPA VALLEY BUSINESS COUNCIL
HOOPA VALLEY TRIBE

My name is Wilfred Colegrove and I am the Chairman of the Hoopa Valley Tribe of northern California. The Hoopa Tribe has reserved fishing and instream water rights in the Trinity River on our Reservation, and we are very disturbed by the way the Bureau of Reclamation has mismanaged our instream flows in favor of its massive Central Valley Project. It is a classic case of how the Interior Department's inherent conflict in interest prevents fulfillment of the federal trust duty to protect tribal natural resources. It also shows how little influence the BIA and the Fish and Wildlife Service have over Reclamation activities that affect tribal rights and fishery conservation.

The Hoopa Valley Reservation is located on the lower Trinity River in northern California. Since aboriginal times, Hoopa Indians have fished the Trinity for salmon and other species. Tribal fishing continues to be of supreme economic, cultural, and religious importance to the Hoopa people.

For over 10,000 years, Trinity River salmon runs remained plentiful, because tribal fishers were careful all those centuries to allow for spawning escapement. This balanced situation changed drastically in the 1960s as a result of the Trinity River Division dams upriver from the Hoopa Valley Reservation. With these dams the Bureau of Reclamation began impounding 90% of the Trinity's average annual flow of 1.2 million acre feet. Reclamation diverted all this water out of the Trinity basin for use by the Central Valley Project, which supplies water for power, municipal and industrial purposes, and above all, irrigated agriculture.

The remaining 10% of the Trinity River's annual flow (120,000 acre feet) proved hopelessly inadequate to preserve the fishery, and in 1981 the Secretary determined that up to 90% of the most important fish runs had been destroyed due to habitat loss caused by depleted streamflows.

Fortunately, the Interior Department expressly recognized a trust obligation to the Hoopa Valley Tribe to restore the natural fishery below the dam. In 1981, the Secretary established a new flow policy on the Trinity River, which increased the "normal year" flow volume to 340,000 acre feet, or almost 25% of the average annual flow. This left over 75% of the water still available for the Central Valley Project.

Unfortunately, this new policy (often called the Secretarial Issue Document or SID) permitted the Bureau of Reclamation to substantially reduce Trinity flows in "dry" or "critically dry" years. Dry years are determined by the amount of water forecasted to flow into Shasta reservoir on the Sacramento river, which is a major source of Central Valley Project water. In other words, Trinity River streamflows depend on the water supply in a different basin, which serves corporate agriculture.

As a result, the Bureau of Reclamation has significantly reduced Trinity streamflows three years out of the past four. In two of those years, the Bureau of Reclamation ignored its own data in order to reduce Trinity River flows in years when "dry" conditions did not in fact exist. During the same period, Central Valley Project water deliveries have not been reduced by a single drop. Trinity fish habitat suffers, while Central Valley corporate farmers use their federally subsidized water to grow surplus crops like cotton or to flood their fields to produce rice.

Legal developments during the 1980s make it clear that it was wrong for the Secretary to have authorized reduced Trinity flows in the policy established in 1981. The Tribe does not believe that the Secretary realized how the Bureau of Reclamation would abuse the "dry year" loophole in that policy. After all, the Secretary recognized that increased flows were required both by the trust duty to the Hoopa Tribe and by Congress's fishery preservation mandate in the 1955 Trinity dam authorizing legislation. (Neither of these legal requirements exist for any other river in California).

On top of that, Congress has appropriated millions of dollars to restore Trinity fish habitat. This investment will be rendered worthless if the Bureau of Reclamation continues to abuse its "authority" to reduce streamflows. The Tribe has appealed streamflow reductions in the past, and discovered Reclamation's appeal process to be a sham. Therefore, we have just filed one final appeal with the Secretary, requesting an end to dry year flow reductions and protection of Trinity River water from the Central Valley Project's ill-advised attempt to "market" even more water. (If there is water available to market, there is no excuse for ever reducing Trinity flows). The U.S. Fish and Wildlife Service and the BIA support our position. So does the Technical Committee of the Trinity River Task Force, which was established under the Trinity Restoration Act of 1983.

We also see what may be a ray of hope coming from the current administration. Our new President is a self-described "classic fishing conservationist." Secretary Lujan, when he was in Congress, questioned the economic wisdom of subsidizing surplus crops when he opposed a bill to expand the service area of the Central Valley Project. The Hoopa Tribe hopes that inquiry by this Committee might help persuade the Secretary to focus proper attention on our request that he reform the 1981

Trinity flow policy. Copies of our administrative appeal documents are being furnished for the record of this hearing.

This concludes our testimony. The Hoopa Valley Tribe is grateful for the opportunity to comment on the basic question of Interior's ability to fulfill its duties to protect tribal water resources.

Respectfully submitted,
HOOPA VALLEY TRIBE

Legal Department
Hoopa Valley Business Council
P.O. Box 1348 • Hoopa, California 95546 • (916) 625-4211

Stephen H. Suagee
Staff Attorney

VIA FEDERAL EXPRESS

April 5, 1989

Patricia M. Zell, Chief Counsel
Senate Select Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, D.C. 20510

Re: Interior Department Conflict in Interest in Administration of Instream Fishery Flows in the Trinity River, Hoopa Valley Indian Reservation

Dear Ms. Zell:

I am the on-reservation attorney for the Hoopa Valley Tribe of northern California, and for the last year I have been pursuing an administrative appeal on behalf of the Tribe regarding Bureau of Reclamation mismanagement of instream fishery flows in the Trinity River on the Hoopa Valley Reservation. Our Tribal Chairman Wilfred Colegrove has been in Washington this week and has apparently discussed this situation with you in preparation for the April 6 Joint Hearing on Indian water rights. He may have had an opportunity to provide you with some of the following documents, which are enclosed herein:

(1) March 27 Letter from Hoopa Tribal Chairman Wilfred Colegrove to Secretary Lujan

(2) March 29 Legal Memo from the Hoopa Valley Tribe to the Secretary

(3) Bound Set of Exhibits in Support of Legal Memo

(4) 1984 Congressional Record Excerpt

Briefly, the Hoopa Valley Tribe believes that the Bureau of Reclamation has improperly favored its Central Valley Project (CVP) over tribal rights to instream fishery flows in the Trinity River on our Reservation. This is a breach of the federal trust responsibility to protect our reserved fishing and water rights. Reclamation has persisted in this because Interior is inherently compromised by its conflicting role as tribal trustee and developer of trans-basin water delivery systems.

Enclosures (1) - (3) constitute an administrative appeal to the Secretary. Enclosure (4) shows that while in Congress, the Secretary opposed a bill pertaining to expansion of a CVP service area on the ground that subsidized reclamation water would be used on surplus crops, as it frequently is throughout the CVP. Waste and inefficiency are common in the use of CVP water; thus the Tribe finds it all the more objectionable that excessive amounts of Trinity water are diverted to the CVP.

At this point, the Tribe remains hopeful that the Secretary will recognize that his obligation to the Tribe compels the relief we are requesting. Another Interior agency, the Fish and Wildlife Service, has already contacted the Secretary advocating a position similar to the Tribe's.

Tribal Chairman Wilfred Colegrove will be attending the April 6 hearing and presenting written, if not oral, testimony. These enclosures provide support for that testimony and I request that they be made pat of the hearing record.

If it is possible to conduct further inquiry into the specific question of the relationship between the Central Valley Project and Interior obligations to the Hoopa Valley Tribe, it might well help persuade the Secretary to grant the relief we seek in our appeal.

Thank you for your consideration of this most important issue, which goes to the heart of Interior's ability to fulfill its obligations to the Hoopa Valley Tribe. If you or your staff have any questions, please do not hesitate to contact me.

Sincerely,

Stephen H Suagee

Stephen H. Suagee
Attorney for the
Hoopa Valley Tribe

Enclosures
040589sensel/i.h2o

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Stephen H. Suagee
Staff Attorney

VIA FEDERAL EXPRESS

April 5, 1989

Mike Anderson
Special Committee on Investigations
Senate Select Committee on Indian Affairs
SH-901 Hart Senate Office Building
Washington, D.C. 20510

Re: Interior Department Conflict in Interest in Administration of Instream Fishery Flows in the Trinity River, Hoopa Valley Indian Reservation

Dear Mr. Anderson:

Enclosed are copies of the following materials, which we discussed during our April 3 phone conversation:

(1) March 27 Letter from Hoopa Tribal Chairman Wilfred Colegrove to Secretary Lujan

(2) March 29 Legal Memo from the Hoopa Valley Tribe to the Secretary

(3) Bound Set of Exhibits in Support of Legal Memo

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Mike Anderson
Special Committee on Investigations
April 5, 1989
Page 2

relief we are requesting. Another Interior agency, the Fish and Wildlife Service, has already contacted the Secretary advocating a position similar to the Tribe's. I encourage you to contact Jim McKevitt, FWS Ecological Services, Sacramento, (916) 978-4613, to request copies of their comments (which I have not yet received).

Tribal Chairman Wilfred Colegrove will be attending the April 6 hearing and presenting written, if not oral, testimony. As it turns out, this is a Joint Hearing of Senator Bradley's Water and Power Subcommittee and the Senate Select Committee. Accordingly, I have also furnished these materials to Select Committee Chief Counsel Patricia Zell, and have requested that they be made part of the record in support of our Chairman's testimony.

If it is possible to conduct further inquiry into the specific question of the relationship between the Central Valley Project and Interior obligations to the Hoopa Valley Tribe, it might well help persuade the Secretary to grant the relief we seek in our appeal, particularly in view of his previous position on the CVP as expressed in the Congressional Record excerpt. I will be drafting sample questions for the Secretary prior to speaking with you again next week.

Thank you for your interest in this most important issue, which goes to the heart of Interior's ability to fulfill its obligations to the Hoopa Valley Tribe. If you have questions prior to my next call, please do not hesitate to contact me.

Sincerely,

Stephen H. Suagee

Stephen H. Suagee
Attorney for the
Hoopa Valley Tribe

Enclosures
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TESTIMONY OF EDWARD LONE FIGHT CHAIRMAN OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

PRESENTED AT THE APRIL 6, 1989 OVERSIGHT HEARING ON INDIAN WATER POLICY

BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

Chairmen Inouye and Bradley and members of the Committee and Subcommittee, my name is Edward Lone Fight and I am the Chairman of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. I would initially express the gratitude of the Three Affiliated Tribes for being granted this opportunity to present our testimony to you. I would additionally express our gratitude for your demonstrated concern for and interest in the protection of Indian water rights by virtue of your having convened this oversight hearing.

On behalf of the Three Affiliated Tribes, I would like to briefly address three issues related to the assertion, protection, and implementation of the federally reserved water rights maintained by all Indian tribes, to-wit: (1) the impropriety of the judicial application of the McCarren Amendment to the adjudication of Indian water rights and claims, (2) the failure of the Interior to allocate to Indian tribes adequate federally appropriated funds for the negotiation of intergovernmental water rights agreements, and (3) the questionable mandated involvement of the state historic preservation officer in the implementation of the National Historic Preservation Act in relation to Indian water projects on reservations.

McCARREN AMENDMENT

The Three Affiliated Tribes assert that the federal judicial policy of determining Indian reserved water rights through the provisions of the McCarren Amendment, 43 U.S.C. §666, is in direct conflict with the fundamental rules and principles of interpreting treaties and federal laws concerning Indians, whereby such documents are to be construed broadly in favor of Indian interests and rights. This contrast is manifested by judicial interpretation of the McCarren Amendment which accretes Indian reserved water rights to general federal reserved water rights without specific Congressional authorization, since no provision of the McCarren Amendment includes or addresses, specifically, Indian reserved water rights. Further, based on federal/tribal governmental distinctions established by the U.S. Constitution and judicial precedent, we maintain that the McCarren Amendment does not apply to Indian reserved water rights. Since 43 U.S.C. §666 addresses expressly only federal water rights, and not Indian reserved water rights, serious consideration must be given to changing the policy direction of the McCarren Amendment, as established by judicial interpretation, to eliminate the detrimental effects such interpretation has had on the Indian tribes in the United States.

Despite the Constitutional and judicial distinctions in federal and tribal rights asserted above, determinations of Indian reserved water rights through quantification procedures controlled by the state courts and legislative law have been affirmed by the U.S.

Supreme Court, in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Through this affirmation, the Court assured that adjudications in state courts would not impair Indian reserved water rights, and any inequitable determinations may be appealed to the federal courts. Id at 813 & 814. Further, the Court held that the McCarren Amendment did not divest federal district courts of jurisdiction over federal water rights litigation, except as otherwise provided by Act of Congress. Finally, the Court held proper the federal district court's abstention, because state law procedures existed to resolve disputes of this nature.

However, the pronounced assurance of the protection of Indian reserved water rights by the U.S. Supreme Court seems to have waned before the prevailing interests of non-Indian economic development, both on and off Indian reservations. Disregard for Indian reserved water rights is clearly illustrated in Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983), wherein the Supreme Court held that the McCarren Amendment allows state adjudication of Indian water rights, even in those states that have explicitly disclaimed jurisdiction over Indian affairs in their constitutions and/or enabling acts. Moreover, a Wyoming state court imposed a water-use efficiency rate substantially higher than the average efficiency rate that was currently achieved by all irrigators in the region - a blatant example of the state's inability to decide, impartially, matters of this nature. In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Nos. 85-203-205; 85-217-218; 85-225-226; 85-235-236 (Wyo. Sup. Ct., Feb. 24, 1988). Clearly, these federal and state decisions do not support the assurance by the U.S. Supreme Court, in Colorado, that an equitable consideration and determination of Indian water rights would be rendered in state courts.

Although the Supreme Court held that the McCarren Amendment did not divest federal district courts of original jurisdiction over federal water rights litigation, the Three Affiliated Tribes contend that the federal judicial policy of resolving Indian water claims in state courts through the application of 43 U.S.C. §666 constitutes a process that grossly protracts the ultimate determination of Indian water claims. This gross delay in determining Indian water rights further delays or impedes avenues for tribes to utilize their natural resources for economic development and self-sustenance.

The record clearly demonstrates that Indian water rights and claims are not being determined in federal forums; rather they are subject to state court adjudication. A very narrow interpretation of Indian treaties has manifested itelf in recent state supreme court decisions - a practice in direct contravention of the tenets of federal canons of construction, thus denying basic rights and resources to which Indian tribes are entitled. Therefore, we conclude that the exercise of state court jurisdiction does impair Indian reserved water rights and the Supreme Court's interpretation of the McCarren Amendment does breach the U.S. Government's special obligation to protect Indians. Furthermore, this breach not only abrogates retained rights, but it also has a direct adverse affect on any positive development based on the use of natural resources within reservation boundaries.

In conclusion, we assert that the McCarren Amendment does not apply to Indian reserved water rights and that Indian water rights and claims should be adjudicated in the federal court system exclusively. The Three Affiliated Tribes, therefore, urge that the United States Congress either repeal or appropriately amend the McCarren Amendment.

FEDERAL FUNDS FOR NEGOTIATION

The Three Affiliated Tribes strongly and justifiably urge that a more substantial amount of federally appropriated funds be allocated, on an annual basis, to Indian tribes engaged or intending to engage in the negotiation of formal agreements recognizing and protecting their various federally reserved water rights. The history surrounding the formal assertion and defense of Indian water rights during past decades should provide ample justification for a comprehensive reassessment by the federal government of the protection of Indian water rights through negotiation vis-a-vis litigation. It will become obvious to Congress and the Interior that the benefits derived from the negotiation process far outweigh the few relative benefits which have typically derived from protracted, costly and adversarial litigation.

Former Assistant Secretary Swimmer, in a December 1988 news release recounting the accomplishments of the Interior in realizing its trust responsibility to the Indian people during the Reagan era, recognized the relative benefits arising out of the negotiation, as opposed to litigation, of water rights in stating that the administration has "through negotiation instead of litigation, been *successful in land and water settlements for tribes." In the context of the award by the Interior of federally appropriated funds to tribes for payment of attorney fees pursuant to 25 CFR §89.40 et seq., the formal criteria upon which the award determination is based provide that "Department policy is to favor negotiation instead of costly, time-consuming litigation." Thus, a policy preferring negotiation in lieu of litigation is apparently evolving within the Interior. This practical policy should be fully developed and supported by adequate appropriation and allocation of federal funds to tribes to enable them to pursue the more beneficial negotiation of water rights agreements.*

Experience during past decades has demonstrated that the achievement of negotiated water rights settlements is far less time - consuming than has been litigation. Obviously, protracted litigation is far more costly than is negotiation - all parties, including tribes and the federal government, are burdened with the exorbitant expense inherent in attorney and expert witness fees and in securing and compiling the more intensive and massive data base necessary in litigation. Negotiation has proven to be more beneficial to the interests of tribes in light of the fact that the parties are not restricted in recognizing and concurring in water claims by the limited judicial principles and criteria which have evolved in water rights litigation over the years. Additionally, tribes have vastly more direct control over the outcome in the arena of negotiation than they have in the courtroom. Not only are the respective temporal, economic, and legal interests of tribes and the federal government better served through the negotiation process, but the political and social interests of the tribes also benefit. Litigation is an *adversarial setting wherein the tribe and the state battle one another to a divisive victory, which antagonistic venture adversely effects future tribal-state relations. Negotiations, on the other hand, result in a settlement with which the parties are generally satisfied and which is achieved in a general atmosphere of cooperation, openness, and mutual trust. The successful tribal-state negotiation of water rights effectively sets the stage for potential future tribal-state cooperation in other areas of resource use and management and in the area of economic development on the reservation.*

A clear, and disturbing, practical assessment of the substantial relative disadvantages typically inherent in the adjudication of Indian water rights was related to the participants in the Symposium on the Future of the Missouri River, held May 1-3, 1988, in Billings, Montana:

> *"John Washakie of Wyoming's Wind River Reservation spoke of the Big Horn General Stream Adjudication and described what happens when tribes and a state litigate water rights. He said the last fourteen years of litigation has been a war of experts who have chalked up $22 million in legal fees that are exported from the state. Negotiations were prevented because the federal attorneys wanted to "win" the Big Horn case for the Indians - despite the Indians' admonitions that they, unlike the attorneys, had to continue living in the area. The litigation has adversely affected state-tribal relations in Wyoming."*

(Excerpted from the February 1989 volume of the Missouri River Brief Series, a photostatic copy of which is incorporated herein as Attachment A.)

The Three Affiliated Tribes have intermittently, during a period of nearly six years, been involved in pre-negotiation preparation and preliminary discussions with the State of North Dakota in pursuit of the realization of a Tribal-State water rights agreement. Our Tribes have experienced first-hand (and are continuing to experience) the frustration, lack of ultimate success, and other adverse effects resulting from the absence of adequate and continual federal funding to tribes desirous of negotiating formal intergovernmental water agreements, which lack of federal fiscal support has proven to jeopardize our own attempt to fully assert and protect our federally reserved water rights.

In 1983, our Tribes were awarded a P.L. 93-638 contract, the funds from which enabled us to secure and compile a majority of the technical data and to perform the preliminary legal research and drafting in preparation for formal water negotiations with the State. The Tribes and the State exchanged their respective preliminary positions addressing the extent and legitimacy of Tribal water claims and participated in a single preliminary pre-negotiation discussion. At the point at which actual negotiations were to commence, the death knell had tolled on the prospective negotiations, due to the expiration of the term of and expenditure of funds under the federal contract and the unavailability of any additional federal funding to support the continued Tribal effort to achieve a final negotiated *water rights agreement.*

Although both our Tribes and the State were anxious to conduct and complete the formal negotiation of the proposed agreement, such desired effort laid dormant for an extended period of nearly four years in the absence of any Tribal or federal funds to support the effort. Approximately one year ago, the State candidly manifested to the Tribes its intent and strong desire to resurrect and complete negotiations in a relatively expeditious manner, in light of perceived pressure being exerted on the State by downstream states. Such pressure has been and continues to be constituted by (1) the continued activity of downstream states in expanding their respective uses of the waters of the Missouri River mainstem system and in planning for major additional developments and (2) the desire and expressed intent of such states to develop an interstate compact allocating water use on the mainstem system. In response to such very real pressure, North Dakota officials have continued to develop a State Water Plan and have gratuitously offered the proposition that it is essential that the water needs of the Tribes be specifically included in the State's plan. In fact, the Governor and Attorney General of North Dakota, on July 8, 1988, directed certain correspondence to former Secretary Hodel, wherein the State officials not only requested the formal participation of appropriate Interior officials and staff in "the anticipated negotiations" with our Tribes, but also urged the Secretary "to give these negotiations a high priority by providing the funding necessary to assist the Tribe (sic) in their goals." (emphasis added) (a photostatic copy of which correspondence is incorporated herein as Attachment B).

In the interest of reviving negotiations with the State, our Tribes have, over the past year, participated in a number of meetings with Interior officials and staff, including former Assistant Secretary Swimmer and representatives of the Office of the Solicitor, the Bureau of Reclamation, and the Fort Berthold Agency, Aberdeen Area Office, and Billings Area Office of the Bureau of Indian Affairs. Such Interior representatives have uniformly manifested their support for the approach proposed by our Tribes to be taken in negotiations with the State and for the imminent revival of negotiations, in an effort to avoid costly and time-consuming litigation of our federally reserved water rights. In fact, the former Assistant Secretary assured us that the Interior would make available specifically to the Three Affiliated Tribes the federally appropriated funds necessary to enable us to pursue and complete negotiations.

Based upon the genuine interest in and support for the resurrection and completion of water negotiations evidenced by officials of the State and Interior, our Tribes, in September 1988, made three timely formal requests for reasonable and justifiable amounts of federally appropriated funds to support the negotiation effort. The ability of our Tribes to continue to pursue and ultimately achieve this crucial goal is absolutely contingent upon the receipt from the Interior of all requested funds. Determinations have, in fact, been made by the Interior on each of the funding requests - the Three Affiliated Tribes have been awarded only an amount constituted by approximately one-fourth of the total amount of federal funds requested.

Such award is grossly inadequate and constitutes yet another chapter in the history of the Interior's utter failure to provide to our Tribes the fiscal support necessary to protect our water rights through the negotiation process, which effort has continuously been supported and encouraged by the State of North Dakota. Should the Three Affiliated Tribes fail to return to the negotiating table in the immediate future and negotiate a final Tribal-State agreement in a relatively expeditious manner, we will have been left out in the cold without our Winters-based water claims and rights having been recognized and protected explicitly in the North Dakota Water Plan and implicitly in the inevitable interstate water compact. We will then be compelled to litigate such claims sometime in the more distant future, in an atmosphere in which the equities will weight heavily against our Tribes.

NATIONAL HISTORIC PRESERVATION ACT

The Garrison Diversion Unit Reformulation Act of 1986 authorized 20.5 million dollars for the construction of municipal, rural, and industrial (MR&I) water systems on the Fort Berthold, Standing Rock, and Fort Totten Indian Reservations in North Dakota. Of this amount, the Three Affiliated Tribes will receive 8 million dollars to construct MR&I systems on Fort Berthold.

The systems will provide high quality water from Lake Sakakawea which will contribute to the general health and economic welfare of our Tribal members and increase the quality of life on Fort Berthold. The planning and design work are almost completed and now the Three Affiliated Tribes are anxious to begin construction on the *projects.*

Once the projects are completed and pumping water, they will constitute an actual utilization of the Tribes' water rights. The water rights will be more than paper rights - they will be perfected rights.

However, even before the first shovel of dirt is turned, obstacles to construction are appearing. Not only must the Tribes compete for scarce federal appropriations, they must also wade through a mountain of bureaucratic red tape. If any one aspect of this bureaucratic nightmare can be singled out as the worst, it would certainly be compliance with Section 106 of the National Historic Preservation Act.

The Tribes are not opposed to the intent of Section 106; the intent is fine. The intent of Section 106 is to take into consideration historic properties prior to construction and provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on federally authorized undertakings which might affect historic properties. However, on Fort Berthold, the administration of this statute has lost any semblance of "reasonableness." This observation is based on the Tribes' first-hand experience in attempting to cope with 36 CFR Part 800, the regulations implementing Section 106 of the Act.

The regulations found in 36 CFR Part 800 create a complex and time-consuming consultation process centered around one individual - the State Historic Preservation Officer, commonly referred to as the

SHPO. On Fort Berthold, it has reached the point with some federal agencies where the SHPO must be consulted before a fence post or telephone pole can be put up. The SHPO is thus given broad authority to stop or hinder projects on Indian lands. We have seen this happen on everything from gas gathering lines to low income housing projects. We do not want to see the same thing happen on our as yet unbuilt MR&I water systems.

What right does a state official have to exercise this authority on Indian reservations? Where is the recognition of tribal sovereignty? The answer is found at 36 CFR 800.1(c)(2)(iii). Among other things, this paragraph states that an Indian tribe can assume the role of the SHPO when and if the SHPO concurs with the assumption by the tribe of his role. At Fort Berthold, we have obtained the concurrence of the SHPO for the Three Affiliated Tribes to assume the role and responsibility of the SHPO. But can this concurrence be unilaterally withdrawn by the State? Of course it can.

The situation needs to be corrected. The regulations need to be revised to recognize Indian tribes as the equals of states. The regulations should be modified so that when an Indian tribe petitions the federal government for the delegation of the authority of the State Historic Preservation Officer, the delegation is expeditiously granted with or without the concurrence of the SHPO.

The development of our water resources could easily be thwarted by a state official who should not even be involved. And after, all isn't the development and resultant beneficial use of water the best method to protect and preserve water rights?

ATTACHMENT A

Boundaries Carved in
WATER
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THE MISSOURI RIVER BRIEF SERIES

SYMPOSIUM ON THE FUTURE OF THE MISSOURI RIVER

JOHN E. THORSON

◆

At the Northern Hotel in Billings during May 1988, an extraordinary event took place. Federal, state, and tribal representatives gathered with other concerned citizens of the Missouri River Basin not to argue their cases before a judge, not to battle one another to a divisive victory—they came, instead, to talk with one another about an issue that concerns everyone: the future of the Missouri River. The spirit of cooperation and frankness that pervaded symposium activities illustrates that westerners can, if just for a few days, live up to their finest tradition and this is, in the words of Wallace Stegner, "that cooperation, not rugged individualism, is of the pattern that most characterizes and preserves [the West]."

At the Symposium on the Future of the Missouri River, held May 1-3, 1988, in Billings, Montana, approximately 150 people representing states, tribes, federal agencies, and private interests gathered to discuss the long-term management of the Missouri River. Founded on the premise that public policy must originate from within in the Missouri River Basin, the symposium was structured so that basin residents and principal policymakers could meet face-to-face to begin to create something new: river management based upon mutual respect. Successful case studies from around the country were presented to show how conflicts over shared natural resources can be resolved and to show how states, tribes, and federal agencies can work together to develop environmentally sound management policies for the natural resources they share.

Participants first attended one of three refresher courses on Missouri River issues: Indian water rights, the Pick-Sloan Plan, and the current management policies for the Missouri River. Then, through panel presentations and discussions, participants examined the successes and failures of the Missouri River's management, heard a series of case studies that presented alternative methods of river management, and then developed possible approaches for the future management of the Missouri River. The participants discussed the issues in small groups and in plenary sessions; summaries of each follow.

PART I: MANAGEMENT OF THE MISSOURI: SUCCESSES AND FAILURES

❖ Keynote Presentation

The symposium began with a keynote address by Daniel Kemmis, former speaker of the Montana House of Representatives. To illustrate the purposes of the symposium, Kemmis referred to the experiences of the Lewis and Clark expedition on the Missouri River. The expedition discovered that three tributary streams converge to form the Missouri. Similarly the states, tribes, and federal agencies—the sovereigns of the Missouri River Basin—must now converge to develop management policies for the river.

Kemmis pointed out that when Meriwether Lewis and William Clark sought the headwaters of the Missouri, they relied on Indians, such as Sacajawea and the Shoshones, for guidance and for the horses they needed. In the century that followed the expedition, many other Americans sought the headwaters of new opportunities, whether they were upon the Great Plains, in the mining camps of the Rockies, or on the coastal plains of California, Oregon, and Washington.

Today, at Three Forks, Montana, the Gallatin, Jefferson, and Madison Rivers converge to form the headwaters of the Missouri River. Kemmis pointed out that Thomas Jefferson and James Madison, two of the namesakes, developed theories of constitutional government that have implications for us today as we confront the management of the Missouri River. Jefferson served as an ambassador to France during the drafting of the U.S. Constitution, so Madison, as chronicler of the Constitutional Convention, had a major influence in its drafting. Because Madison assumed that people basically cannot get along, he supported dividing and counterbalancing the different branches of government with a division of powers between federal and state governments.

Jefferson, Kemmis noted, was concerned about the absence of fundamental democratic principles in the Constitution that emerged from the Convention. Jefferson believed the Madisonian approach substituted government for the ability of people to govern themselves and work out problems face-to-face. Jefferson wanted a human-scale government that would enable personal interactions, and he had faith that the expanding frontier would bring about an agrarian society where these democratic values would thrive.

Kemmis said that for Madison, however, the frontier represented another one of the checks and balances of power. Madison felt that as the frontier opened up, the population would become so spread apart, it would be impossible for any special interest to aggregate or to "know itself." Thus, Kemmis observed, the frontier became for Madison the basis for keeping people apart.

Kemmis said the West, including the plains along the Missouri River, was America's safety valve, a means to dissipate political discontent. But in the last century, he noted, America has filled its frontier. After the settlement of the West Coast, America began turning in on itself and the vast reaches of the Rocky Mountains and Great Plains were populated—just as A.B. Guthrie's character Summers, in *Fair Land, Fair Land,* leaves Oregon for the Great Plains. Many of the people in the Missouri River region are people who ended up going east to find the West. There have been two tendencies in this region: a restless tendency to move on and not confront oneself and others; and a tendency to stop, settle, and say, "No further, this is the place!" This is the fundamental ambivalence about our region.

In the last century, Kemmis felt that Americans have developed other methods to avoid confronting themselves and others. American imperialism has been one method. Another has been the development of the American bureaucracy, that, in essence, is another way to avoid looking each other in the eye. He said Americans have developed a procedural republic, with impersonal means of handling conflict: no one has to look out for the public good; everyone looks out only for his or her own personal good. Each group has veto power over any conceivable solution, and all parts of our society wage war upon the whole.

Kemmis indicated that the symposium was designed to present case studies on how people can break out of this procedural republic. He concluded his presentation with another example from the Lewis and Clark expedition. Upon their return, Lewis and Clark split their troops at Lolo Pass, and Lewis went to explore the Marias River. While camped with a Blackfeet war party, an unfortunate shooting incident broke out and Lewis and his troops fled down the river, fearing that a large Indian war party was in pursuit. Years later, a member of the Lewis and Clark Expedition and a member of the Indian party, both old men, met over another campfire. After hearing the old soldier's story of the incident, the Indian chuckled and said that rather than pursuing Lewis and his troops, his party had fled north, fearing that a large number of soldiers were in hot pursuit. Kemmis said we must abandon the methods we have used to avoid confronting ourselves and others; we must stop running away from each other. It is time to end our restless exploring, Kemmis concluded, for if we interact with each other, face-to-face, we will begin to know the headwaters for the first time.

Small Group Discussions

After the keynote presentation, participants took part in one of sixteen workshops to discuss and identify water management problems in the Missouri River Basin. The participants identified the following as major problems:

- The lack of identified needs and information in the basin, and the absence of a commonly accepted data base for technical information about the Missouri River Basin. The states and the tribes have not defined their interests in the Missouri River. Mutual goals have not been established for the basin and there is a shortage of short- and long-term planning for the region.

- There is inadequate motivation and leadership in the basin. It seems to take a crisis to bring about negotiations and progress.

- Negotiations are not the best forum for the discussion of water rights. Some parties believed these water right issues are best handled by the courts.

- Fear and lack of trust divide the governments of the basin and permeate the relationships between states, states and tribes, states and the federal government, and Indians and the federal government. In each of these relationships, one party feels the other party holds the high cards, and insecurity abounds.

- Posturing, poor communication and a win-lose mentality characterize relationships in the basin. There is little recognition of other states' interests in the Missouri Basin.

- Many parties expect that water will be allocated as soon as negotiations commence. Such an allocation may be premature and may put the less-prepared parties at a disadvantage.

- Values are changing in the Missouri River Basin. Increased public interest in water, and a new emphasis on instream flows and inter- and intra-basin marketing have created uncertainty about the security of water rights and the validity of former management policies.

- Different water regimes, such as the prior appropriation and riparian doctrines, have hampered good relationships in the basin. Different regions in the basin place different emphasis on the types of water use: upper basin states make consumptive use of the water, while lower basin states are more interested in nonconsumptive uses.

- Negativity and fear permeate the basin. Many decisionmakers believe the issues are too complex, and little can be accomplished, because it is impossible to get all the parties together. Each party seems to have veto power over all the others. The wide range of issues in the Missouri River Basin also contributes to the inability to reach agreements.

> *The symposium was structured so that basin residents and principal policymakers could meet face-to-face to begin to create something new: river management based upon mutual respect.*
>
> ❖

- The federal presence in the basin is pronounced, and this has been a problem in the past. In some areas, the federal management of the river may be necessary, but in other areas, federal policies may not represent local interests.

- Water management issues are not acute enough to command the broad attention they deserve.

- The region as a whole has not confronted the conflicting interests of the upper and the lower basins of the Missouri River.

PART II: MANAGING THE MISSOURI FOR TOMORROW: COOPERATIVE APPROACHES

❖ Case Study: Missouri River Negotiations— Why Haven't They Worked?

Participants in the panel presentation included Larry Fasbender, Director of the Montana Department of Natural Resources and Conservation; Bill Crews, former Missouri River Coordinator for the State of Iowa; and Jim Laue, President of the Conflict Clinic, George Mason University.

The panelists examined the failure of the 1986 Missouri River negotiations among representatives of the ten basin states. These negotiations were a direct result of litigation concerning the construction of the ETSI Pipeline Project using water from South Dakota's Oahe Reservoir.

■ Getting to the Table

Following Kansas Governor John Carlin's invitation in 1985, it took almost a year for the state representatives to get to the negotiating table. This was due to the general apprehension of some states; some governors in the basin wanted to be assured that the negotiations were worthwhile. Tribal and federal representatives were not involved in these negotiations, because the states wanted to reach an agreement by the end of 1986, and because they did not understand the extend of tribal and federal interests in the Missouri River. The states also felt that if they reached a consensus, it would be easier to deal with federal agencies.

■ What Happened at the Table

In Spring 1986, the state representatives gathered at the table, expecting to reach a limited compact by the end of the year. Each state began by defining its interests and concerns in the basin. It soon became apparent, however, that it might not be possible or desirable to negotiate a compact in such a limited time. Negotiators then developed a statement of principles for the basin to help ensure an ongoing relationship among the states. These principles covered the reasonable use of water for each state, information sharing, anticipatory problem solving, conflict resolution, the role of federal agencies, and the procedures to guide ongoing processes.

Some of the lower basin states were concerned about out-of-basin water transfers and whether payment for that water would be shared with all the states. The upper basin states wanted to be certain they got their share of Missouri River water. They wanted to define the quantity of water that could put to use without the interference of other states.

■ Process and Negotiation

The staff of the Missouri Basin States Association (MBSA) provided support for the negotiations. The negotiators considered, but rejected, the possibility of having an outside facilitator for the negotiations because the majority of the representatives wanted to work out the problems themselves. The representative from Kansas attempted both to chair these negotiating sessions and to represent Kansas' interests.

Meetings were held almost monthly from April through December 1986, and generally lasted two days. In the first few sessions, each state outlined its interests and its positions on issues concerning the Missouri River. During the late summer and fall, the statement of principles was drafted and revised with the assistance of a drafting subcommittee. The drafts were occasionally rewritten by states, and some states brought their own versions. By fall, agreement had been reached on a majority of the principles, but negotiators could not agree upon the provisions concerning the reasonable use of water. The negotiators had not adopted any specific rules or procedures to guide this drafting process.

■ The Results?

The 1986 negotiations yielded both positive and negative results. Although an agreement was not reached, the negotiations could not be considered a failure. The process brought ten high-level state officials, appointed by the governors, to the table for the first time, which facilitated an exchange of information and a development of trust among the principals. Those involved in the process learned much about the other states.

The negotiators did not, however, have sufficient time to do the job required of them. The negotiators needed more time to define the issues and to develop adequate procedures for the negotiations. They needed more time to develop trust and to exchange information. Negotiators needed more information on the wide range of alternative solutions that were available to them. The ETSI lawsuit was hanging over everyone's heads and added pressure to the process. The result was a watered-down statement of principles that was unsatisfactory to the few states that felt that other avenues, such as litigation, would yield better returns.

■ What Happens Now?

Many state representatives believe that negotiations among the states should continue. This, however, requires the continuing commitment of governors. Future negotiations must include some of the other players in the basin, although size does affect the meaningfulness of the negotiation process. The negotiators need to experiment with alternative ways of conducting future sessions.

◆ Case Study: Pacific Northwest Fisheries

To explore alternative methods of cooperation between the states, tribes, and federal agencies in the Missouri River Basin, participants heard a case study on the agreements concerning the Pacific Northwest Salmon fisheries. The presentation was made by Tim Wapato, Chairman of the United States-Canadian Pacific Salmon Commission.

Indians in the Pacific Northwest have depended on the Pacific salmon for nearly 11,000 years. The salmon are an integral part of Indian culture, religion, and commerce. When non-Indians arrived in the region in the nineteenth century, competition for the salmon began. Tribal rights to fish, hunt, and gather berries were reserved in an 1855 treaty with the United States; yet, almost immediately, these rights came under attack or were ignored.

When mainstem dams were constructed on the Columbia River during the Depression and World War II, the migratory patterns of the salmon were seriously altered. This development, in conjunction with Indian and non-Indian fishing, resulted in the endangerment of the fish. Litigation on behalf of the tribes of Washington and Oregon was brought by the federal government. During the 1970s, *United States v. Washington* and related cases made their way to the U.S. Supreme Court on eight different occasions; and on eight different occasions, the court affirmed that as a result of the 1855 treaty, the tribes have the right to fish and to have fish available. The tribes have the exclusive right to manage the fish on their reservations. They also have the right, off the reservation, to cooperatively manage the fishery resource with state officials.

Many state officials and non-Indians believed that the Indians could not responsibly manage the salmon, and that the resource would be destroyed. After the litigation, bitter feelings remained between the Indians and non-Indians, and no vehicle was available through which state and tribal officials could begin to manage the salmon.

In the early 1980s, two developments enabled state and tribal officials to overcome their differences. The first was the proposed Pacific Northwest Electric Power Planning and Conservation Act, which all parties realized would affect the fisheries resource of the Northwest. Before the legislation was passed in 1980, state and tribal officials met on an informal, ad hoc basis to make the needed amendments to the act.

The second development was the result of the threatened existence of the salmon, whose numbers had been drastically reduced by Indian and non-Indian fishing. Salmon migration was also threatened by the unregulated Canadian catches in the North Pacific. The United States and Canada had been negotiating this issue since 1976, but after the Supreme Court's decisions regarding the Indians' rights to fish, the tribes were allowed to participate in the negotiations as full members of the U.S. delegation. Over the next few years, representatives from twenty-four tribes were involved in all aspects of these international negotiations, including the technical work.

The negotiations resulted in the North Pacific Salmon Intervention Treaty, which was concluded in 1984 and ratified by the governments of Canada and the United States in 1985. The Pacific Salmon Treaty Coalition, which consisted of the representatives of four states, twenty-four tribes, and forty non-Indian organizations (over 8,000 individuals), developed grassroots political support for the ratification of the treaty.

The treaty provides each country with four commissioners. The U.S. delegation is made up of one commissioner from Alaska, one commissioner who represents Washington and Oregon, one commissioner who represents the twenty-four tribes, and one non-voting federal commissioner.

Cooperation between the states and tribes has helped: each year the size of salmon migrations has gradually increased. This cooperation has had other benefits as well. The tribes created the Columbia River Inter-Tribal Fish Commission to provide them with the technical information they need to exercise their management responsibilities. The Columbia River Basin Fish and Wildlife Authority has been created by thirteen tribes, four states, and federal agencies to develop policies by consensus for the management of the fish and wildlife resources. Disputes concerning private forestry practices (which have an effect on fish habitat) have been funnelled through another multi-party organization, the Timber-Fish-Wildlife Forum. This consensus process has yielded a timber management agreement which is now being implemented.

> *Americans have developed a procedural republic, with impersonal means of handling conflict: no one has to look out for the public good; everyone looks out only for his or her own personal good.*
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Although the issues are different in the Missouri River Basin, there may be some lessons here. Litigation was ultimately unsuccessful in resolving the conflict. If several coordinated institutions share the same direction, a single, unified organization may not be necessary for responsible natural resource management. The parties have built organizations through which they may both resolve conflicts and cooperate in the future, and in these organizations, the tribes of the region are full, responsible parties.

❖ Case Study: Northwest Power Planning Council

The Northwest Power Planning Council, established by the Pacific Northwest Electric Power Planning and Conservation Act of 1980, was discussed by Gerald Mueller, who served as a member of the Council for seven years. While conflicts are still present in the Columbia River Basin, no other region of the country has formally and publicly embarked on this kind of a cooperative venture to chart its electrical energy future and to conduct what may be the largest fish and wildlife restoration effort in the world.

The passage of the Northwest Power Act was a minor miracle, given the number of interested parties: the governors and legislatures of Oregon, Washington, Idaho, and Montana; the federal government, represented primarily by the Bonneville Power Administration (BPA); about 120 publicly-owned and eight privately-owned electric utilities; seventeen large industrial customers of BPA; thirteen tribes or confederations of tribes; seven state and federal fish and wildlife agencies; and numerous public and private interest groups.

The legislation's passage was aided, in part, by the sixty-year period of cooperation that was needed to construct and operate one of the most complex hydroelectric systems in the world. The more direct causes of cooperation were the impending energy shortage in the Northwest, the growing threats to salmon and steelhead runs, and the federal courts' recognition of the Indians' stake in these fisheries. There seemed to be no way out—save federal legislation that would balance the interests of all parties.

The legislation expanded the power and responsibilities of the BPA, and gave the four states the power to legally and politically evaluate BPA actions through the cooperative mechanism of the Northwest Power Planning Council. The Council consists of eight members, two from each of the four states, who are appointed by their respective governors and confirmed by their legislatures.

The Northwest Power Act allows the Council to develop regional power plans and fish and wildlife plans. BPA is precluded from purchasing new power in excess of 50 megawatts (or investing in conservation measures producing that amount of power), unless the proposed action conforms with the Council's plan. BPA must also protect and enhance fish and wildlife in a manner consistent with the Council's plan.

Mueller cited the factors that he felt contributed to the success of the Northwest Power Planning Council: the stable funding source that is provided by a surcharge on hydropower sold by BPA; a clear policy mandate from Congress to the Council; the clear definition of the Council's authority that limits its involvement in state water rights, state energy siting decisions, Indian treaty rights, and related topics; and the Council's commitment to openness in its proceedings, which includes a vigorous public communications effort.

Finally, Mueller discussed two other factors that have been important to the Council's success. First, Council members are politically accountable to the governors and legislators of their states. Second, the Council does not run the dams; it is a policy and planning group that must rely on persuasion and technical expertise to implement its views. Mueller concluded that, although it is a slow process, cooperation based on persuasion is the best route for solving regional natural resource controversies.

❖ Case Study: The Fort Peck-Montana Compact from the Trible Perspective

Caleb Shields, a member of the Sioux and Assiniboine Tribal Council of the Fort Peck Reservation, provided a tribal perspective on the negotiation of the 1985 Fort Peck-Montana Compact. Shields was deeply involved in the negotiation of this compact that quantifies the reserved water rights of the Fort Peck Reservation.

Shields began by citing an example of how tribal and non-Indian interests can converge to manage natural resources. In the late 1970s, the Tribal Council of the Fort Peck Reservation proposed upgrading the reservation from a Class II to a Class I airshed to increase the reservation's air quality protection. Although this proposal was opposed by some non-Indian groups, many non-Indians supported the redesignation because it would provide greater protection for air quality than the state provided. During the process, however, the tribal council convened public hearings, which non-Indians attended. In the end, the tribe redesignated its airshed, and it is now one of only three tribes in the United States that has exercised that air quality regulatory power. The example illustrates that tribes, by exercising their authority over their natural resources, can also provide procedural safeguards for non-Indians. It also illustrates that Indian and non-Indian interests in natural resources can be aligned.

Shields outlined some of the considerations tribes must weigh as they prepare for negotiations or litigation concerning their reserved water rights, and cautioned tribes to carefully assess the advantages of negotiations versus litigation. The tribal councils may have to decide whether to promote negotiations if the tribal membership does not want them. The council must also determine who will negotiate for the tribe: all council members, council staff, a tribal attorney, an outside consultant, or an outside attorney.

Shields indicated that there are certain givens when negotiating for tribes. One is that the present tribal council, not the tribal council that negotiated the water rights accord, will be held responsible for any shortcomings of the agreement. The tribal council must be intimately involved in developing and approving the positions and concessions that are taken or made in the negotiations. There is a question, however, about whether the council should go ahead and act on its own authority or wait until after a tribal meeting.

Three tribal members, who had a combined total of more than fifty years of tribal government experience, were involved in the Fort Peck-Montana compact negotiations. The long process of negotiating started in 1981. In 1983 the tribe thought it had an agreement with the state, but the state pulled out of the agreement, which made some tribal members believe that there is no reason to trust the white man. The negotiations resumed, however, in 1984 and were concluded in an agreement that was approved both by the state and the tribal council in 1985. The agreement has also been approved by the U.S. Attorney General and the Secretary of the Interior.

Shields concluded with some general observations about negotiations between tribes and states over water. He indicated that the relationship is usually characterized by mistrust on the part of the tribes—they feel defensive because they are being asked to give up a portion of their claims to the water. Also, states and tribes do not have much experience dealing with one another. He believed that the most important aspect of these negotiations is to involve everyone who has expressed interest. This ensures that if agreements are made, they can be safeguarded and implemented. Many tribal councils also have difficulties dealing with leaders who are not tribal council members. Tribal council members are obligated to communicate with and seek the approval of these off-council leaders on these issues The short terms of state and tribal governments, and the turnover of state officials, also makes negotiating difficult. Most tribal councils, for example, have two-year terms for their members. The Montana Legislature has a ninety-day session every other year and its members are elected for two- or four-year terms.

❖ Small Group Discussions

In the second set of small group discussions, participants discussed which features of the preceding case studies might be relevant for the development of consensus-building processes and permanent institutions in the Missouri River Basin. The following is a summary of the opinions expressed during these workshops.

■ Many participants felt that the case studies did not fit the Missouri well, although there was some interest in the Northwest Fisheries case study.

- The 1986 Missouri River negotiations were an example of ineffectual participation. The negotiators needed the services of a facilitator, and they were hampered by the shortness of time.

- The Missouri River negotiations involved too few of the important basin players. These negotiations did result in a realization that a Missouri River agreement does not necessarily have to divide the waters. A nonbinding statement of principles can be an important result. Trust is very important in the negotiating process.

- The Northwest Fisheries case was an example of a process that included all the players. Litigation forced the issues, and the parties were motivated. The resulting agreements clarified legal and technical obligations, and ownership interests.

- The Northwest Fisheries case also indicated that conflict can be transformed into great strength. Conflict is not necessarily bad if it is a catalyst for action—as it was in securing agreements concerning the management of salmon in the Pacific Northwest. The agreement's success is a testament to the dedication of good, hardworking people.

> *Negotiations were prevented because the federal attorneys wanted to "win" the Big Horn case for the Indians—despite the Indians' admonitions that they, unlike the attorneys, had to continue living in the area.*
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- The Northwest Power Planning Council seemed less relevant to the Missouri River Basin although the passage of the legislation involved many groups in the process. The Missouri Basin States Association has not been similarly representative.

- Still, the Northwest Power Planning Council is a tale of great success. Leadership and the exploration of different possibilities were important to that success. The Power Planning Council indicates that, with sound leadership, policies can be developed for an entire river basin. These policies can be flexible and dynamic. They need not be a strict allocation of the resource, but they can be based on innovative means for sharing the economic rents derived from the region's rivers.

- The Northwest Power Planning Council also resulted from a crisis. It benefited from the favorable funding mechanism. The Council has completed some constructive projects.

- The Fort Peck-Montana Compact apparently resulted from relatively easy negotiations. The negotiators were responsible, and both sides were concerned about the cost of litigation.

- The Fort Peck-Montana Compact was also characterized by good luck, good timing, and the State of Montana's willingness to and capacity for allowing these negotiations to take place. The case study is an example of the benefit of positive political leadership. Each side needs to understand its interests before entering into negotiations, but there is value in taking risks. Patience is also important: some agreements grow old before the words take effect, but it does not mean that the words are wrong.

- The Fort Peck-Montana Compact and Northwest Power Planning Council illustrate how parties can agree to share the economic benefits of water or energy.

- Participants expressed the need to identify the relevant actors in the Missouri River Basin and the need for an entity to bring these people together. The entity should be small, like a negotiating group, and should work through subgroups as well.

- A basin planning body should include all interested parties. The Pacific Fisheries case study was an example of an organization that seemed to have represented all the interests.

- Some people felt that the problems in the basin are not pressing enough at the moment, and that we may be proposing institutions or solutions in search of problems.

- Should basin leaders deal with these problems now or in the future? Participants preferred planning for the future now so that the process may be more orderly.

- The technical knowledge of the basin's decision-makers and water managers should be improved. The basin needs a task force to examine data, the quality of data, and the possibility of uniform data-gathering. These data processes should be more user-oriented.

- We should remember that the basin issues need not be confined to the Missouri River. There are opportunities for cooperative economic development in the basin as well.

- A systems approach should be used to optimize the uses and benefits of water in the basin—in essence, a holistic approach to basin management.

- The citizens and leaders in the basin should continue to learn about basin issues through such things as research and issue papers. The sovereigns in the basin should further educate themselves, and should encourage the same for their people. The Northwest Power Planning Council has the advantage of having money to educate.

- We should recognize that all basin issues and concerns cannot be addressed by one organization.
- The problems of the Missouri River Basin appear to be related to a lack of goals, leadership, and time. The pressure of litigation has also been a problem, as has the absence or exclusion of interested players, such as the tribes.
- Many participants want a new, more inclusive forum for policy discussions in the basin. Such a forum could help synthesize information and data about the basin, as well as develop plans for promoting the economic opportunities of the basin. Such a forum could unite basin actors in matters of common concern.

PART III: MANAGING FOR THE FUTURE: WHAT IS THE PREFERRED SCENARIO?

The second morning of the symposium was devoted to the development of ideas and approaches for managing the Missouri River. The session opened with a panel that discussed the range of approaches that could be used to develop cooperative water management policies for the basin. A second panel addressed what members felt were realistic approaches, given political, institutional, and economic realities in the basin. Finally, participants broke into small groups for a more thorough discussion of "next steps," and the results of these workshops were reported to symposium participants in a final plenary session.

◆ Approaches for Developing a Water Management Process

The first panel discussed the differenct ways a water management process could be developed for the Missouri River. Daniel Sheer, President of Water Resources Management, and John Thorson, an attorney with Doney & Thorson in Helena, Montana, were the presenters. Jim Laue of The Conflict Clinic was the facilitator of the discussion.

Sheer suggested that if the allocation of the Missouri River's benefits is changed the system will change. The Pick-Sloan Plan implies that benefits will be distributed among the states of the region. The status quo is made up of those who presently receive those benefits. Basin decisionmakers must evaluate how these benefits could be expanded or reallocated. Benefits could be traded among the parties for example. In addition, the tribes need to be involved in the process. There are ways to evaluate the present distribution of benefits in the basin and to measure the consequences of augmenting or reallocating those benefits. Certain tools—computer modeling, gaming, or computer-assisted negotiations—could involve the public in the process. These approaches would also enable people to make better use of the information that exists.

Sheer said basin leaders must first develop policies for allocating benefits, then develop institutions to carry out those decisions. To do so, however, the analysis and management of basin information must be greatly improved.

Thorson contended that there is a range of institutional opportunities and possibilities for the Missouri River Basin that could include ad hoc agreements for information sharing, reservoir management, and compensation for the parties that were adversely affected by the Pick-Sloan Plan. Thorson said informal, nonbinding agreements, like the Great Lakes Charter or the statement of principles drafted by the Missouri River negotiators in 1986, were important examples because they established on-going relationships among the parties in a dynamic, nonthreatening process.

Thorson suggested that binding agreements do not have to be as rigid as the water allocation compacts that have been utilized elsewhere in the West. Binding agreements can be simple agreements about one issue such as data sharing. They can be water allocation agreements, such as the Yellowstone River Compact, the Colorado River Compact or the Fort Peck-Montana Compact, or they can be a mass allocation between the upper and lower basins of the river. Binding agreements can also be complex water allocation agreements that establish institutions to manage a range of water issues, such as the old Missouri River Basin Commission or the Pacific Northwest Salmon Agreements. Finally, agreements can create sophisticated institutions like the Northwest Power Planning Council that have some authority over a multiplicity of resources including water, energy, fish, and revenues. Thorson asked participants to keep Dan Kemmis' questions in mind as they consider these possibilities for the Missouri: does the proposed organization prevent the interested parties from running away from each other? Does it force them to look each other directly in the eye?

◆ Panel: Realities of Basin Water Management

The morning's second panel allowed the panel members and the audience to evaluate, from a practical standpoint, what progress could be made among the sovereigns of the Missouri River Basin. Panel members were Joe Harkins, the Director of the Kansas Water Office; John Smith, the Secretary of Water and Natural Resources for South Dakota; and John Washakie, Chairman of the Shoshone Business Council, the Wind River Reservation in Wyoming.

Harkins reminded the participants that the Missouri is a large basin, and that although there is great diversity among the states, the ten states in the basin must learn to manage the water so they do not harm neighboring states. This diversity, however, has implications for a basin-wide institution. Each state's unique configuration of interest groups (including Indian tribes) makes the creation of an umbrella, basin-wide institution difficult. Each state has the ability to use confrontational strategies to litigate. Harkins suggested that the management of the basin must be from "the ground up" because states are more concerned about local water problems than basin-wide problems.

Harkins indicated that Kansas does not want to negotiate a "super-structure" for the basin, instead it is interested in negotiating for ways to avoid conflict. Kansas would like to see data procedures standardized, which might take decades to accomplish. Kansas would also like to monitor the quantification of Indian reserved water rights to be sure that agreements or decrees are prudent and reasonable.

A forum would be a place where trust could grow, and where conflicts could be mediated.

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Finally, Harkins suggested that discussions take place concurrently among many basin players— from policymakers to data managers. He has concluded that, while there may not be a water problem in the Missouri River Basin, there is a relationship problem.

John Smith discussed some of the political realities facing the basin. Congress is definitely oriented toward urban areas. Budget deficits reduce the range of possibilities that are available to decisionmakers. Agriculture is losing political power. Environmental interests probably have more influence in Washington than the combined political clout of the basin, if it existed.

Smith suggested that basin governments must consider the current allocation of benefits in the basin, because "we are not going to build our way out of this problem." First, however, basin governments must develop a track record of cooperation starting with projects such as water data management. As long as it did not supplant the MBSA, a basin-wide forum or working group would encourage communication among the basin states. Such a group could begin by drafting model legislation for compatible data collection and analysis. Smith thought it might be difficult to work with a large number of tribes, but if they were interested, it should be tried.

John Washakie of Wyoming's Wind River Reservation spoke of the Big Horn General Stream Adjudication and described what happens when tribes and a state litigate water rights. He said the last fourteen years of litigation has been a war of experts who have chalked up $22 million in legal fees that are exported from the state. Negotiations were prevented because the federal attorneys wanted to "win" the Big Horn case for the Indians—despite the Indians' admonitions that they, unlike the attorneys, had to continue living in the area.

The litigation has adversely affected state-tribal relations in Wyoming. The current governor has met fewer times with the tribal council than the territorial governor did in the 1800s. Still, Washakie said there are some positive signs of cooperation, such as the recent removal of 900,000 tons of uranium tailings from the reservation.

Washakie maintained that although water is important to tribes, it is one issue among a constellation of other tribal priorities, including economic development, alcoholism, and programs for handicapped individuals. Efforts to develop tribal water codes may compete for attention with Missouri River issues.

In the ensuing audience discussion, Jeanne Whiteing, an attorney for several tribes, concurred that, although water is one of the most important tribal issues, it is difficult for tribes to look beyond the boundaries of their reservations. Also, while tribal representatives have been involved in the symposium, many individuals still see basin tribes as just another interest group. Nonetheless, tribes and other governments in the Missouri River Basin need to look at the total picture and engage in a continuing, basin-wide dialogue. The tribes must organize themselves to understand and become involved in basin affairs. The basin must establish a track record of cooperative activities among basin governments.

Other members of the audience suggested that the impact of the Pick-Sloan Plan on individuals must be examined, children must be educated about the natural resources of the basin, and that collection and distribution of hydroelectric power revenues must be understood.

❖ Concluding Panel: Where Do We Go From Here?

For the last time, symposium participants broke into their small groups to identify the next key steps that should follow the symposium. The moderator of each small group joined the concluding panel of the symposium, and an attempt was made to synthesize the small group reports. The concluding panel was chaired by Richard Brown, former director of the Missouri River Basin Commission. Brown specifically asked the panelists whether a basin-wide forum for states, tribes, and federal agencies was needed; and, if so, what are the next steps toward such a forum. The following summarizes the small groups' key responses to Brown's charge.

■ Since there is now no apparent crisis in the basin, there is an even greater need for strong leadership to take advantage of the calm. The benefits of continued discussion clearly outweigh the perceived lack of a crisis.

■ Another symposium should be held that focuses on the allocation of river-based benefits throughout the basin and the relationship of river management to state and tribal economic development. The symposium should be held in the lower basin, and tribal participation should again be encouraged.

■ A forum, comprised of senior state, tribal and federal representatives, should be created to continue the basin-wide dialogue. Special efforts must be made to involve the tribes and representatives of the lower basin states. The forum should be structured as an inter-sovereign organization, although the way to accommodate the basin's numerous tribes is unclear. The inter-sovereign organization might be created by Congress or by informal agreement among the sovereigns. Northern Lights should provide support for the creation of such a forum.

■ More informal communication is needed to develop trust and understanding of the different needs and perspectives in the basin. A forum would be a place where trust could grow, and where conflicts could be mediated. Nonconfrontational processes should be utilized. The organization's proceedings should be open to the public.

■ Opinion was divided about whether the forum should be a new organization or a restructured MBSA. Some participants suggested expanding MBSA to include other basin governments, restructuring MBSA to establish a strong interest group advisory committee and to seek a portion of hydropower revenues to fund its activities. Others suggested that MBSA should continue primarily as a state organization, but should provide greater opportunities for tribal and federal agency participation.

■ In any case, participants saw the need for states and Indian tribes to have their own caucuses. In particular, a coalition of Missouri River basin tribes should be established to coordinate activities and positions, and to share technical information.

■ Regardless of how it is created, the inter-sovereign forum should begin addressing the distribution of benefits in the basin, their role in regional economic development, and the basin account. Computer-assisted negotiations and simulations should be used to experiment with new policies for the Missouri River Basin, but discussions concerning the tradeoff or reallocation of these benefits need not take place immediately.

■ Other issues that could be addressed by the forum include water data management, Indian water rights, the shortcomings of the Pick-Sloan Plan, and planning for drought.

■ Such an inter-sovereign organization should have political clout, especially with Congress, and should be able to cut through the water bureaucracy. The organization should also stress communication with, and the involvement of, basin residents. One observer indicated that the future leaders for this proposed organization were present at the symposium.

■ An effort to manage water data should proceed in increments to identify the data upon which the governments agree, to isolate the data upon which they disagree, to define data needs, and to make data more usable to all parties.

■ The Northern Lights Institute should continue its strong educational role on Missouri River issues. There is a special need for education about the Pick-Sloan Plan, and what it has yielded. The Institute should also communicate with congressional delegations and technical people.

■ In particular, Northern Lights should publish additional Missouri River briefs on topics such as: the amount of water in the basin, the present distribution of benefits in the basin, the instream flow needs of fish and wildlife, and whether tribal water rights will be charged against the basin or against individual states.

The symposium concluded at noon on Tuesday, May 3, and participants were assured by Northern Lights' representatives that their recommendations would be considered by the Project Steering Committee as it charts the next phase of the Missouri River Management Project.

This review of the symposium is best concluded with the admonition of Charles Wilkinson, President of the Board of Directors of the Northern Lights Institute:

> Many people at the symposium have observed that there is no major crisis in the basin at the moment. Yet, what realistic people do in such circumstances is to plan for the future. The rarest resource in the Missouri River Basin is trust. Realistic, practical people do not lose an opportunity to build trust. ■

THE MISSOURI RIVER MANAGEMENT PROJECT

The Missouri River Management Project helps residents of the Missouri River Basin understand the cultural, economic, and environmental importance of the Missouri River and its major tributaries. A multi-year effort sponsored by the Northern Lights Institute, the project seeks to identify the water-related problems that produce tensions among basin residents and to facilitate communication and conflict-management to reduce those tensions. The project will also identify the existing public policies that result in inequitable use of the water resource and in threats to the riparian environment. Project sponsors hope that through policy analysis and public education, an informed citizenry will demand and support courageous, responsible decisions for the future management of the Missouri River.

NORTHERN LIGHTS INSTITUTE

The Northern Lights Institute analyzes issues concerning the future of the Northern Rockies—principally Montana, Wyoming, and Idaho—for the benefit of citizens who want to develop and implement responsible public policies. Only an informed, active citizenry can defend the region's economic and environmental integrity. To this end, Northern Lights gathers and disseminates accurate, timely, and objective information for public use; provides a forum for education, debate, and a cooperative approach to complex problems; and contributes to the development of well-informed citizen leaders.

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GEORGE A. SINNER
GOVERNOR

July 8, 1988

The Honorable Donald P. Hodel
Secretary of the Interior
Department of the Interior
C Street Between 18th and 19th
Streets, Northwest
Washington, D.C. 20240

Dear Secretary Hodel:

The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota recently met with representatives from the State of North Dakota. Together we discussed the Tribe's renewed interest in a negotiated resolution of its reserved water rights. This is to solicit your participation in the anticipated negotiations.

Both the Tribes and the State recognize the complexity of negotiating this issue and the current uncertainly of the State's water rights. Both also recognize the most meaningful negotiations can only take place if the federal government is involved. Consequently, the State and the Three Affiliated Tribes request your participation in those negotiations.

It is also the Tribe's desire to solicit your participation and assistance in technical matters necessary to provide the foundation for quantification of the Tribe's rights. We support the Tribe's request for any assistance the Department of the Interior can provide to them through the Bureau of Indian Affairs.

In closing, it is the purpose of the state that some agreement can be reached which will assure the interests of all North Dakota citizens, both Indian and non-Indian, are addressed and protected in these negotiations. Given the Federal government's special trust relationship with our Indian citizens, we urge you to give these negotiations a high priority by providing the funding and staffing necessary to assist the Tribe in their goals.

Sincerely,

George A. Sinner | Nicholas Spaeth
George A. Sinner | Nicholas J. Spaeth
Governor | Attorney General

cc: Three Affiliated Tribes

ALEX J. LUNDERMAN
President

VERNON "IKE" SCHMIDT
Vice-President

Rosebud Sioux Tribe
ROSEBUD INDIAN RESERVATION
ROSEBUD, SOUTH DAKOTA 57570

Incorporated Under Act of June 18, 1934, 48 Stat - 984

PHONE 605-747-2381 — P.O. BOX 430

SHARON L. BURNETTE
Secretary

CHARLES WHITE PIPE, JR.
Treasurer

Good afternoon Mr. Chairman and members of the committee. My name is Alex Lunderman and I am the President of the Rosebud Sioux Tribe. On behalf of our members, I would like to thank you for this opportunity to present this written testimony on matters related to water.

Missouri River Development

The Rosebud Sioux Tribe claims water rights to all tributaries touching the boundaries of the original land base cited in the Treaty of 1868 including the Missouri River. Current Water Rights policies favor the users of the water. Although the Rosebud Sioux Tribe has many uses and needs for the water flowing through the Missouri River, we have not had access to the capitol needed to develop these resources nor have we had any assistance from the federal government for the development of this resource. Although we have not had any assistance, many others have through the development of rural water systems, dams, recreational facilities, irrigation projects, and hydro electric power.

A major key for economic self sufficiency is the development of our natural resources, water being the main ingredient. However, it takes a lot of time and money to do this and we must rely heavily on the federal government for this support. We have in our possession plans and feasibility studies for several water development projects and are awaiting your support to continue.

While the following projects are being developed, your committee might consider the reallocation of existing benefits for people to include the people of the Rosebud Sioux Tribe and other Indian Nations as well. One such benefit is the use or right to purchase the cheap power produced by the hydro-electric projects along the Missouri River. Currently, power produced by these projects is being wheeled to other areas and we are forced to purchase our powers from more expensive power producers at a cost many times higher than that of energy companies who purchase power from the Missouri River Basin. This, in itself, would be a great relief to our Indian People who are already suffering from severe poverty.

Missouri River Basin Indian Water Rights Commission

The Missouri basin tribal leaders have decided to form a Missouri River Basin Indian Water Rights Commission. The water commission will take a leadership role on tribal government's primacy over Indian water and the management of it. The commission will also consolidate the efforts and interests of the participating tribes to derive greater benefit for each individual tribe.

In order to set up the commission, we requested the BIA Area Director in Aberdeen to arrange authorization and appropriation of $100,000 per year so that the commission became a reality. We have received a response from the Area Office indicating that a line item will be added to the FY 1990 revised budget, requesting funds for the proposed water rights commission.

We are requesting now in this testimony that funds in the amount of $100,000.00 to be earmarked in BIA's 1990 budget for the said commission.

WATER QUALITY ENFORCEMENT

We have a Water Quality Enforcement application pending with EPA for more than one year. The amount required from EPA to fund the project is to the tune of $41,332.00. We don't know what is the reason for this long hold up. All the bottlenecks be removed and the requested funding provided. Briefly, the project involves monitoring of water quality around production wells supplying water to the communities, the individual water wells, around landfills and underground storage tanks.

ROSEBUD RURAL WATER SYSTEM

The northern communities in Rosebud Reservation suffers from tremendous water shortage, although the reservation is rich in ground water from Ogallala aquifer in the south. Hence, the water shortage problem in the north can easily be resolved by piping water from the south. We have a blue print to do exactly that, but for lack of funds the Tribe is not in a position to complete this important task. The amount of funds required to complete the entire project is approximately 6 million dollars. At this time, we would like to request funding to the tune of 1 million dollars, so that an important part of the project can be completed, which is to link up Black Pipe from Parmelee, a total pipeline length of 20 miles.

LITTLE WHITE RIVER DAM PROJECT

A cursory investigation by the Tribe and an Engineering Company to locate a hydro-electric dams project on the Little White River, in Rosebud Reservation indicated some highly positive results. A Plan of Study prepared by the Bureau of Reclamation also indicated that the project may be feasible. However, a formal feasibility study needs to be conducted to come to a conclusion. In this regard, Bureau of Reclamation requires authorization and appropriation to the tune of $600,000.00 by the Congress, in order to begin the feasibility study. Our Tribe strongly requests that funding be provided to BOR without any more delay, so that feasibility study on the Little White River dam project can be completed.

This concludes my testimony today on behalf of Rosebud Sioux Tribe, on matters related to water resources. I sincerely appreciate the opportunity you have given me to present the views and needs of our tribal members to you this afternoon.

Vernon J. Schmidt - Vice Pres.
for Alex J. Lunderman, President
Rosebud Sioux Tribe

PREPARED STATEMENT OF CHARLES W. MURPHY, CHAIRMAN STANDING ROCK SIOUX TRIBE

As Chairman of the Standing Rock Sioux Tribe, I am extremely pleased at the opportunity to make this presentation to the Senate Select Committee. There is no more important issue to the Standing Rock Sioux and other Tribes of the western United States than the preservation, protection, administration and utilization of our valuable rights to the use of water.

The health and welfare of the Indian Tribes depends upon our rights to the use of water. Our economic future is dependent on water. Our sovereignty is being challenged by the states because of water. Failure to maintain our water rights will leave the reservations without an economic future and without the capability to maintain jurisdiction over the Tribe and its members.

Since the mid-1970's, there has been an ever increasing challenge by the states and other special interest groups, including the rural electric cooperatives, to our rights to the use of water. Those rights are for present and future purposes, measured by irrigable lands, fishery, municipal, industrial and other uses. Our rights are prior and superior to non-Indian water rights created pursuant to the doctrine of appropriation subsequent to the establishment of our treaties and reservations.

In addition to opposition from the states, our Winters Doctrine rights to the use of water have been impacted by (1) the increasing conflict of interest of the Secretary of the Interior, (2) restrictive criteria developed by the Department of Justice to constrain our water rights, (3) interpretation of the McCarran Amendment by the U.S. Supreme Court to include Indian reserved rights in state adjudication proceedings and (4) National Policy to finance tribes willing to negotiate water rights while withholding funds from tribes choosing not to negotiate. The Secretary of the Interior and the Attorney General have played an increasing role in the suppression of our water rights and "forced" negotiation.

The letter of the Select Committee of March 21, 1989, states that:

> "The Committee hearing will also explore the need for a Federal Policy and process to guide parties who may elect to engage in negotiations to resolve their competing claims to water through legislative settlements."

I am certain that the Committee would include in the Federal Policy a process to support tribes not seeking negotiation. The past three administrations have made it very clear that only those tribes willing to negotiate will receive federal technical assistance, funding and other support. The tribes feel compelled to negotiate, even in instances where negotiation will be clearly detrimental to tribal interests. I petition the Committee to review this matter and provide some measure of protection and support for tribes that do not choose to negotiate.

We are concerned about negotiation on many grounds, including but not limited to, the fact that negotiations have, historically provided greater benefits at the outset than at the conclusion of the negotiation process. For example, in the early 1960's, the Navajo Indian Tribe and the State of New Mexico negotiated the division of the San Juan River, and the negotiation was approved by Congress. In the June 1962 Act, the Navajos were guaranteed 508,000 acre feet annually for the irrigation of 110,630 acres, and the City of Albuquerque was guaranteed a firm water supply from the headwaters of the San Juan River. In the implementation, however, the project facilities for the Rio Grande River Basin and the City of Albuquerque were developed to 2.5 times the capacity of the annual water supply authorized by Congress and the Navajo Indian Irrigation Project was built to approximately 50% capacity before its recent termination by the administration's Office of Management and Budget.

I am also informed that last year Congress approved the Salt River Pima-Maricopa, Colorado Ute and San Luis Rey Indian water rights settlements with an estimated direct federal cost of some $126 million. However, the FY 1990 Interior Budget requests only $5 million for each settlement. Subcommittee Chairman Sidney Yates asked Interior Secretary Manual Lujan how the administration would pay for those settlements under the circumstances and received an unsatisfactory answer.

In the Missouri River Basin, the Standing Rock Sioux Tribe finds it extremely difficult to consider any type of negotiation. The Missouri River Basin Pick-Sloan plan (MRB-PS) has controlled and suppressed Indian water development since passage of the authorizing legislation in the December 1944 Flood Control Act. These circumstances are described in the paragraphs that follow.

Standing Rock and 26 other Indian tribes of the Missouri River Basin are located on semi-arid lands of the Northern Great Plains and are dependent upon agriculture for an economic base. Many of the tribes have large tracts of irrigable land within the exterior boundaries of the reservations. In the Dakotas, by far the better lands along the Missouri River were taken from the tribes for construction of six main-stem Missouri River dams and reservoirs, all part of MRB-PS. Table 1 lists those dams and their hydropower capabilities.

TABLE 1
MAIN STEM MISSOURI RIVER DAMS

Mainstem Dam	Nameplate (megawatt)	Percent by mw	1990 Annual Megawatt Hours x 1,000	Percent by mwh
Fort Peck	185	7.71	1,034.5	11.02
Garrison	518	21.60	2,318.3	24.70
Oahe	786	32.78	2,647.5	28.21
Big Bend	468	19.52	995.5	10.61
Fort Randall	320	13.34	1,701.6	18.13
Gavins Point	121	5.05	686.9	7.32
Mainstem System	2,398	100.00	9,384.3	100.00

In 1976, the Secretary of the Interior prepared a draft Environmental Impact Statement entitled "Water for Energy, Missouri River Reservoirs". It was determined that during the 50 years between 1983 and 2033 there were no less than 1.2 million acre feet of water available annually from MRB-PS to allocate to the States of Montana, North Dakota and South Dakota for energy development. Contracts have been executed on the basis of those findings between the Secretary of the Interior and some of the affected states.

It must be underscored, however, that the determination of available water supply of 1.2 million acre feet was predicated upon failure to provide any proper consideration of the Winter's Doctrine water rights of the 26 Indian tribes. The Standing Rock Sioux Tribe requests the opportunity to come before this Committee to demonstrate that the Secretary of the Interior has planned the future operation of the Missouri River Basin, has undertaken contracts with states for water marketing and has totally failed to consider even minimal quantities of water reserved to the Indian tribes of the Basin.

Compounding the failure to consider the Tribe's rights by the Secretary of the Interior, is the considerable influence of the downstream states of Nebraska, Iowa, Missouri, and Kansas, who depend on continuing flow of the Missouri River for the purposes of navigation. These states are heavily represented by the U.S. Army Corps of Engineers, the agency that developed the navigation channel below Sioux City, Iowa, and the agency that is responsible for regulation for the six main-stem Missouri River dams to supply navigation flows, not only for the benefit of the Missouri River but also for the benefit of the lower Mississippi River.

An additional force suppressing both the tribes rights to the use of water and tribal efforts to obtain proper compensation for the taking of their lands by the United States for construction of the MRB-PS dams and reservoirs on the Missouri River are the electrical power interests that are highly subsidized by the low-cost federal energy produced at the dams listed in Table 1.

Standing Rock is prepared to show that many of the Indian tribes in the Western United States are paying the highest rates for the use of electrical energy despite the fact that the tribes are "preference" entities entitled to participate in the low-cost federal energy. It is a fact, however, that in many instances, the utilities serving the reservations have entered into contract agreements with generation and transmission companies that are responsible for repaying federal loans on highly-expensive, coal fired electrical generation, and the tribes are not receiving the benefits of low-cost federal hydropower, either directly as "preference" users or indirectly through the electrical cooperatives.

Any efforts by the tribes to develop our water rights, including irrigation, is resisted by the rural electrical cooperatives (REC's), because the tribes would utilize water now producing federal hydropower that benefit the REC's and because the tribes are entitled to low-cost federal pumping power for irrigation, which the REC's are currently utilizing.

Moreover, the REC's oppose proper compensation to the tribes for the taking of Indian lands for construction of the Missouri River dams and reservoirs, because the REC's are receiving contracts for electrical energy at low rates that would be impacted (the degree of impact is slight) if the proper costs of implementation were reflected in the federal power marketing system.

At Standing Rock and other Missouri River Basin reservations, the tribes are proceeding as positively and as aggressively toward economic development as we can. We are developing irrigation, but at an extremely slow pace. Our drinking water supplies, which have historically been well below national standards due to poor water quality of the region, are now being upgraded with implementation of projects such as Garrison and Mni Wiconi. However, considerable more federal investment is required before adequate water supplies can be made available.

For the reasons set forth above, the efforts of the tribes are constantly compromised. The states seek expanded jurisdiction over both the adjudication and administration of our water rights. The Secretary of the Interior has a growing conflict of interest and has planned our use of water at little more than existing uses. The REC's oppose both development, proper compensation and our direct use of hydropower because they insist upon their continued heavy subsidization. The net effect on the tribes is economic suppression and increased pressure to negotiate, a solution as I have indicated, is less than desirable in practice.

At Standing Rock, there have been 303,000 irrigable acres identified within the boundaries of our reservation. It has been further determined that the irrigation of those lands requires as much as 1,300,000 acre feet annually. We will continue to endeavor to preserve, protect, administer and utilize our rights, despite the opposition that is mounting to our self-determination and sovereignty. We have seen the approach of the Department of Interior and the Department of Justice in the recent Wind River case from the State of Wyoming. As shown in Table 2, the Department of Justice used criteria that resulted in the reduction of the Arapaho and Shoshone irrigable lands from 490,000 to 48,520 acres. In this state adjudication proceeding, pursuant to the McCarran Amendment, the conflict of the Secretary of the Interior was manifest and the willingness of the Department of the Justice to represent the interests of the Secretary of the Interior over and above the interests of the Arapaho and Shoshone Tribes, was likewise manifest.

We are not without hope at Standing Rock, and our plans for irrigation development will continue. Upgrading of our drinking water supplies is of utmost importance, and will continue. Our water code has been implemented and will serve as a basis for our jurisdiction over standards and criteria for water quality and water use within the reservation. We are rehabilitating dams within the reservation with safety deficiencies. We are seeking proper compensation for the taking of 56,000 acres of land for construction of the MRB-PS Oahe Dam and Reservoir, and we are seeking an allocation of low-cost federal power and the development of our own electrical utility to stimulate our economic development.

The interest of the Committee is greatly appreciated. I would be more than happy to present additional information in support of this statement on this issue of water rights, an issue of vital importance to the well-being of present and future generations of Standing Rock Sioux.

TABLE 2
WATER CLAIMS BY THE DEPARTMENT OF JUSTICE
ON BEHALF OF THE WIND RIVER INDIAN RESERVATION

History of Modification of Irrigable Acreage by the Department of Justice	Future Irrigable Acreage	Master's Report
United States Arable Acreage **	490,000	p. 157
Original Claim by United States	88,000	p. 154

Acreage by United States, Reduced Before Trial	76,027	p. 154
Acreage by United States, Reduced Before Trial	53,560	p. 154
Acreage Decreed By Master	48,520	p. 204

** United States "arable" definition: those lands which, are capable of sustained irrigation or which can sustain long-term irrigation. p. 156

William H. Veeder
Attorney at Law
818 - 18th Street, N.W., Suite 920
Washington, DC 20006

(202) 466-3890

March 16, 1989

Ms. Louise Springman
4001 Pinehurst Ct.
Riverton, Wyoming 82501

Dear Ms. Springman:

Thank you for your letter of February 11, 1989, and the material sent to me in regard to the Decision of the Supreme Court of Wyoming in the Wind River case. I regret that due to the press of work in my office, I have been unable to respond sooner to your letter. You have suggested that I forward to you a proposal to represent the Tribe. I appreciate your suggestion but find that ongoing litigation prevents me from assuming further responsibilities.

Irrespective of the fact that I could not, under the circumstances, undertake to represent your Tribes, I feel impelled to comment upon the decision of the Supreme Court of Wyoming and the position taken by the Attorney General of the State of Wyoming before the Supreme Court. The decision by the majority of the Wyoming Court is a clear departure from the basic principles of the Reserved Rights Doctrine. That decision fails to recognize that those rights are interests in real property and cannot be denigrated in the manner attempted by the Wyoming Court. The concepts advanced by the Wyoming decision must be rejected by all Indian Tribes as an aggressive attack upon Indian rights and interests.

Moreover, it must be remembered that successive Secretaries of the Interior intentionally violated the Treaty rights of the Wind River Indians by committing Wind River-Big Horn River water to downstream non-Indian projects and further violated the Tribes' Treaty rights when they purported to comply with state law, thus threatening the invaluable reserved rights guaranteed to the Tribes under the Constitution of the United States and the Treaty of 1868.

It is a historical fact that, when the Reserved Rights Doctrine was enunciated in Winters v. United States in 1908, the Secretaries of the Interior and their subordinates assailed those principles, systematically violated them, a course of conduct which is ongoing today.

Those violations of the Reserved Rights Doctrine, to my personal knowledge, have had disastrous consequences on the Yakima Indian Reservation, the Fort Apache Indian Reservation, the Wind River Reservation, the Crow Indian Reservation and generally

throughout western United States. It had been the studied practice of the Department of Justice up to the middle of the 1940s to refrain from asserting the principles of the Winters Doctrine. That course of conduct fully supported the policies of the Secretary of the Interior in building Federal Reclamation Projects for the non-Indian communities and intentionally violating Indian rights in furtherance of those non-Indian projects.

When the principles of the Winters Doctrine could no longer be suppressed by the Department of Justice and the Solicitors Office of the Department of the Interior, those attorneys seized upon the term "practicably irrigable acreage," which was used interchangeably with "irrigable acreage" in Arizona v. California and launched an ongoing attack upon the rights of the American Indians, which must be successfully countered if the Indians are to survive. The Wyoming decision is but a logical step in furtherance of the policy of the Secretary of the Interior to provide water for the non-Indian communities while planning the Indian Tribes out of existence. The Wyoming decision presages the destruction of the downstream Missouri River Tribes, as it presages the destruction of the Wind River Reservation.

The criteria applied by the Department of Justice in determining "practicably irrigable acreage" within the Indian Reservations is having a catastrophic affect. Those attorneys are fully aware that the Indians are competing with non-Indian projects. The water users in those non-Indian projects have been highly subsidized by the federal tax payers both as to the costs of construction of their irrigation projects and as to the equally important costs of operation and maintenance of their projects. For example, the non-Indian water users pay 6 mills for electrical power and the costs for electrical power to the Indians in the same watershed is 91 mills. In simplest terms, the discriminatory rates preclude the American Indians from utilizing their water and other natural resources with the consequence that a viable stable economy on the Reservation is virtually impossible.

Finally I wish to refer to the brief filed by the office of the Attorney General of the State of Wyoming with the Supreme Court in the Wind River litigation. This is the first heading of "Argument" in that brief:

> The Federal Reserved Water Rights Doctrine Was Created By This Court [the Supreme Court] As A Safety Net Or Insurance Policy To Cure Retroactively Congressional And Executive Oversights Which Threatened To Leave Certain Indian Reservations Without Necessary Water. Water Rights Should Not Be Granted Under The Doctrine When There Is No Demonstrated Need For Reserved Water In Addition To That Water Which is Available To A Reservation From State Water Rights

Which Were Acquired Pursuant To Congressional Direction.

To suggest, as stated by the Attorney General of the State of Wyoming, that the Supreme Court could create reserved rights to the use of water partakes of the bizarre. The United States of America and the Indian Tribes, as owners of the lands in question, could and did reserve rights to the use of water in the Wind River and its tributaries and the Supreme Court declared and determined that those reserved rights were adequate to meet the present and future water requirements of the American Indian Tribes. Most assuredly those rights were not "created" by the Court nor could they be thus created. It is important to remember that reserved rights to the use of water are interests in real property of the highest dignity and invaluable which can only be taken from the Indians by a condemnation proceedings with payment to the Tribe for the value of the rights. To suggest, as does the Attorney General, that those interests in real property constitute a "safety net" created by the Supreme Court simply evidences the ongoing attacks upon the Reserved Rights Doctrine by officials who most assuredly are aware of the basic principles of law which they are attempting to circumvent.

A prime example of the sophistry in which the Wyoming Court indulged in seeking to devastate the Wind River rights of the Indian Tribes is reflected in that phase of the opinion entitled "Monitoring of the Decree by the State Engineer." Not only did the Wyoming Court pervert the law in regard to the constricted waiver of sovereign immunity in the McCarran Amendment, the Wyoming Court virtually struck down the Tribes' inherent sovereign power to administer its natural resources within the Reservation effectively guaranteed by the Treaty of 1868. Failure to seek a review of that critical phase of the opinion is inexplicable. That aspect of the opinion must be subjected to intensive review by the Wind River Tribes and all other Tribes interested in preserving their inherent power to manage their own affairs.

It is my understanding that the Tribes in the Missouri Basin are seeking to unite for the purpose of protecting their reserved rights in that drainage which appears to me to be the only sensible approach for American Indians to pursue. Most assuredly the Wyoming decision, if applied throughout the Missouri River Basin, would be as calamitous for the numerous Tribes in that drainage, as it is for the Wind River Tribe.

Thank you again for bringing these matters to my attention. My comments relate to only a few of the outrages committed upon your Tribes in the Wind River cases and all other Indian Tribes facing the same challenges as you are to your very existence. I have not, of course, reviewed the misconceptions involving the Reserved Rights Doctrine as broadly assailed by both the Wyoming decision and brief filed with the Supreme Court by the Attorney General of that State. I believe, moreover, that there are fatal defects in the decision which must not be permitted to stand unchallenged. Additionally, the assaults upon the Reserved Rights Doctrine by the Attorney General of the State of Wyoming and the perversion of legal principles must be exposed for what they are, namely, police-state tactics to destroy a minority.

Sincerely,

William H. Veeder
William H. Veeder

Charles W. Murphy
Chairman
Standing Rock Sioux Tribe
Fort Yates, North Dakota 58538

April 5, 1989

The Honorable Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington D.C. 20510

Attention: Hawley

Dear Senator Inouye:

The enclosed letter was written to Mr. Ken Ballen, Chief Counsel to the Select Committee's Special Investigations Subcommittee, in response to a request by Mr. Ballen that I explain how the conflict of interest within the Interior Department has affected the Standing Rock Sioux Tribe. As this letter may be of interest to the Select Commitee itself as you develop a record on federal Indian water policy, I appreciate your attaching it to the testimony which I submitted on behalf of our Tribe, for your oversight hearings on April 6, 1989. I trust that this request shall not impose an undue burden on your staff.

Again, I want to express my sincere appreciation for the opportunity to submit written testimony for your oversight of Indian water policy.

Sincerely,

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe

Enclosure

Charles W. Murphy
Chairman
Standing Rock Sioux Tribe
Fort Yates, North Dakota 58538

November 14, 1988

Mr. Ken Ballen, Chief Counsel
United States Senate
Special Committee on Investigations
Select Committee on Indian Affairs
901 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Ballen:

I would like to thank you for affording the Standing Rock Sioux Tribe, as well as other Tribes encountering the conflicts of interest in the Departments of Justice and the Interior, a chance to discuss these issues with your staff and yourself. I shall take this opportunity to make some follow-up remarks on how these issues affect Standing Rock.

Although we are not currently a party to a state court water rights adjudication, we are very concerned with this prospect. The state of South Dakota expressed interest in having its courts quantify our water rights in the past (see State of South Dakota v Rippling Water Ranch, Inc., No. CIV-80-3031 DJP (S.D. 1983), dismissed without prejudice), and as water becomes increasingly scarce, we believe that they will do so in the future.

Unfortunately, considerable ill will persists in North Dakota and South Dakota among non-Indians against the Indian people. The extremely aggressive opposition among most non-Indian South Dakotans to S.705 (popularly known as the Bradley bill) is but one example. As state court judges are elected, to some extent they will feel the need to satisfy non-Indian political pressure to limit our water rights, should these rights be adjudicated in state courts.

There was a question during our November 2nd meeting regarding the legal authority for the quantification of Indian reserved water rights in state courts. The United States Supreme Court interpreted the McCarran Amendment, 43 U.S.C. §666, as requiring a federal court to defer to a concurrent state court proceeding involving the same Indian water rights claims. Colorado River Water Conservation District v United States, 424 U.S. 800 (1976). The court subsequently held that even those states with disclaimers of jurisdiction over Indians in their constitutions could exercise jurisdiction over Tribes, in water rights adjudications. Arizona v San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983). Thus, although both North Dakota and South Dakota disclaimed all jurisdiction over the Tribes within their boundaries upon being admitted into the Union, the Court will permit those states to quantify our water rights in their courts, pursuant to a Congressional act which does not even mention Indians, or purport to affect Indian water rights.

During our November 2nd meeting, your staff emphasized that it sought to learn about specific cases of conflict of interest in the Departments of Justice and the

Interior. Of course, Standing Rock is concerned with the prospect of being forcibly represented by Justice in state court water rights adjudications. We are concerned that other Tribes are being subjected to this. Nevertheless, it is the institutional conflict of interest within Interior-that the Bureau of Reclamation serves non-Indian water users, while the Bureau of Indian Affairs is responsible for protecting Indian rights, including water rights, which detrimentally affects the Missouri River basin Tribes.

In 1973, the National Water Commission found that:

> Following Winters, more than 50 years elapsed before the Supreme Court again discussed Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters doctrine. With the encouragement, or at least the cooperation of the Secretary of the Interior-the very office entrusted with protection of all Indian rights-many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations... With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the water used for the project... In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters....

In 1944, Congress passed the Flood Control Act, 58 Stat. 887, which authorized the construction of several dams along the main stem of the Missouri River. Nearly 56,000 acres of Standing Rock's best agricultural and pastoral lands were flooded, to provide for flood control and hydropower generation for non-Indians downstream. In 1986, Congress passed the Garrison Reformulation Act, 100 Stat. 418, which authorized a massive water development project in North Dakota, directly upstream from Standing Rock.

These acts, two of the most significant pieces of water legislation in this nations history, both substantially impacted Standing Rock's reserved water rights. Yet the Interior Department supported both acts. Nowhere in the legislative history of either act will you find any consideration of their detrimental impact on our water rights.

In developing its current plans for water development in the Missouri River basin, Interior intends to severely constrict the the quantity of Missouri and Grand River waters to which we are entitled under the Winters doctrine. The document which I provided to you during our November 2nd meeting details this information. That document shows how the Secretary of the Interior, our "trustee", is working administratively to to bypass Winters and limit our water rights. As doing so will provide more water for non-Indians downstream, we are justifiably concerned that he will succeed in his efforts. This is why the Standing Rock Sioux Tribe seeks your assistance in protecting our right to our water, perhaps our most valuable natural resource on Standing Rock. Without the right to an adequate water supply, our becoming self-sufficient-the very purpose for which our reservation was established-will be virtually impossible.

Sincerely,

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe